IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1485

THOMAS J. HILLIGOSS AND KAY BERRYMAN, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Appellants,

vs.

ARTHUR J. LaDOW, AS MAYOR OF THE CITY OF KOKOMO, INDIANA, ET AL.,
Appellees.

GERALD SWING AND MARGARET TOMLINSON, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Appellants,

vs.

ARTHUR J. LaDOW, AS MAYOR OF THE CITY OF KOKOMO, INDIANA, ET AL.,
Appellees.

APPEAL FROM THE COURT OF APPEALS OF INDIANA, SECOND DISTRICT.

JURISDICTIONAL STATEMENT.

DONALD A. SCHABEL,
111 Monument Circle,
Suite 1200,
Indianapolis, Indiana 46204,
(317) 636-5511,
Attorney for Appellants.

PAUL I. HILLIS,
3415 South LaFountain Street,
Atrium Building,
Suite 1
Kokomo, Indiana 46901,
(317) 453-2374,
Of Counsel.

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

INDEX.

CITATIONS.

Cases.

Statutes.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No.

THOMAS J. HILLIGOSS AND KAY BERRYMAN, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Appellants,

vs.

ARTHUR J. LADOW, AS MAYOR OF THE CITY OF KOKOMO, INDIANA, ET AL.,
Appellees.

GERALD SWING AND MARGARET TOMLINSON, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Appellants,

vs.

ARTHUR J. LADOW, AS MAYOR OF THE CITY OF KOKOMO, INDIANA, ET AL.,
Appellees.

APPEAL FROM THE COURT OF APPEALS OF INDIANA, SECOND DISTRICT.

JURISDICTIONAL STATEMENT.

Appellants appeal from the judgment of the Court of Appeals of Indiana, Second District, which affirmed the judgments of the Howard Superior Court, Division No. 1, in the above cases. This statement is submitted by appellants to show that the Supreme Court of the United States has jurisdiction on an appeal to

review the final judgment in question and should exercise such jurisdiction in this case.

OPINIONS BELOW.

The Supreme Court of Indiana did not deliver an opinion in declining discretionary review in this case. The opinion of the Court of Appeals of Indiana, Second District, has not yet been officially reported but is unofficially reported in 368 N. E. 2d 1365 and in 59 Ind. Dec. 528. The opinion and judgment of the Howard Superior Court, Division No. 1, is unreported. Copies of said opinions are set forth in Appendix A (at pages A1 and A16, respectively), *infra*.

JURISDICTION.

These are consolidated class actions for mandate against the Board of Trustees of the Police Pension Fund of the city of Kokomo, Indiana, the Board of Trustees of the Firemen's Pension Fund of the city of Kokomo, Indiana, and the Common Council of the city of Kokomo, Indiana. The first case listed in the caption was filed by Thomas J. Hilligoss, a retired member of the police department of the city of Kokomo, Indiana, and Kay Berryman, a widow of a former member of said police department, on behalf of themselves and as members of a class consisting of all other retired members and widows and dependents of former members of said police department who are entitled to pension payments pursuant to the provisions of IC 19-1-24.[1] The second case listed in the caption was filed by

1. Appellees in the police pension case not named in the caption are Elva W. LaDow, as Treasurer of Howard County, Indiana; Keith Anderson, as Chief of Police of the city of Kokomo, Indiana; Jerry C. Wilson, Henry Melton, Lawrence R. Darlin, Robert E. Lytle, Jerry K. Cody and Harold P. Braden, as members of the Board of Trustees of the Police Pension Fund of the city of Kokomo, Indiana; and Robert E. Massey, Ralph W. Neal, Douglas Hogan, Robert M. Louks, James T. Papacek, James S. Sutterfield, John W. Kennedy, James Mannion and Stephen Dailey, as members of the Common Council of the city of Kokomo, Indiana.

Gerald Swing, a retired member of the fire department of the city of Kokomo, Indiana, and Margaret Tomlinson, a widow of a former member of said fire department, on behalf of themselves and as members of a class consisting of all other retired members and widows and dependents of former members of said fire department who are entitled to pension payments pursuant to the provisions of IC 19-1-37.[2] The consolidated actions sought to have the trial court mandate the Boards of Trustees of the Police and Firemen's Pension Funds and the Common Council of the city of Kokomo, Indiana, to include in the base for calculation of pension benefits certain items of compensation that had theretofore been excluded and to correct corresponding deficiencies in past pension payments. The actions for mandate were brought pursuant to IC 34-1-58.

The judgment sought to be reviewed was entered by the Court of Appeals of Indiana, Second District, on November 8, 1977. A timely petition for rehearing was filed on November 14, 1977, and denied on November 17, 1977. A timely petition to transfer the cause to the Supreme Court of Indiana for review was filed on November 28, 1977, and denied on February 16, 1978. The notice of appeal to this Court was filed in the Court of Appeals of Indiana, Second District, on February 22, 1978. Copies of the notice of the issuance of the opinion containing the judgment sought to be reviewed,[3] of the order denying the petition for rehearing and of the order denying the petition to transfer the cause to the Supreme Court of Indiana for review are set forth

2. Appellees in the firemen's pension case not named in the caption are Robert E. Donoghue, as Chief of the Fire Force of the city of Kokomo, Indiana; William D. Carter, Raymond D. Johnson, Morris J. Nichols, Robert M. Cox and William F. Hudelson, as members of the Board of Trustees of the Firemen's Pension Fund of the city of Kokomo, Indiana; and Robert E. Massey, Ralph W. Neal, Douglas Hogan, Robert M. Louks, James T. Papacek, James S. Sutterfield, John W. Kennedy, James Mannion and Stephen Dailey, as members of the Common Council of the city of Kokomo, Indiana.

3. When the Indiana appellate courts decide an appeal by written opinion, the judgment entered is contained in the opinion. A separate form of judgment is not issued.

in Appendix C (at pp. A28, A32 and A37, respectively), *infra*. A copy of the notice of appeal is set forth in Appendix D (at pp. A38-A39), *infra*.

The jurisdiction of the Supreme Court of the United States over this appeal is conferred by 28 U. S. C. § 1257(2).

Cases (grouped by jurisdictional questions involved) believed to sustain the jurisdiction of this Court are as follows:

1. There is a final judgment rendered by the highest court of the State of Indiana in which a decision could be had: *Cohen* v. *California*, 403 U. S. 15 (1971); *Interstate Circuit, Inc.* v. *City of Dallas*, 390 U. S. 676 (1968); *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U. S. 157 (1954); *Minneapolis, St. Paul & Sault Ste. Marie Ry. Co.* v. *Rock*, 279 U. S. 410 (1929); *American Railway Express Co.* v. *Levee*, 263 U. S. 19 (1923).

2. The federal question was timely and properly raised in a petition for rehearing in the court rendering the judgment sought to be reviewed: *Great Northern Ry. Co.* v. *Sunburst Oil & Ref. Co.*, 287 U. S. 358 (1932); *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill*, 281 U. S. 673 (1930); *Missouri ex rel. Missouri Ins. Co.* v. *Gehner*, 281 U. S. 313 (1930); *Saunders* v. *Shaw*, 244 U. S. 317 (1917).

3. The non-federal grounds of decision are without any fair or substantial support, and the result could have been reached only by giving effect to the statute complained of as unconstitutional: *Columbia Railway, Gas & Electric Co.* v. *South Carolina*, 261 U. S. 236 (1923); *Detroit United Railway* v. *Michigan*, 242 U. S. 238 (1916); *Terre Haute & Indianapolis R. Co.* v. *Indiana*, 194 U. S. 579 (1904); *Houston & Texas Central R. Co.* v. *Texas*, 177 U. S. 66 (1900); *accord, Ward* v. *Love County*, 253 U. S. 17 (1920).

The statute of the State of Indiana whose validity is involved is Acts 1977, P. L. No. 9 (Sp. Sess.), § 15, pp. 135-136 (IC

19-1-46). The said statute is set forth in Appendix E (pp. A40-A41), *infra*.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

Article I, Section 10, of the Constitution of the United States in pertinent part provides:

> "No State shall * * * pass any * * * Law impairing the Obligation of Contracts, * * *."

Section 1 of the Fourteenth Amendment to the Constitution of the United States in pertinent part provides:

> "No State shall * * * deprive any person of * * * property, without due process of law; * * *."

Appellants have vested contract rights to their pensions. The police pension statute, IC 19-1-24, and the firemen's pension statute, IC 19-1-37, are set forth in Appendix E (at pp. A42-A55 and A56-A76, respectively), *infra*.

The statute that appellants contend impairs the obligation of their contracts with the city of Kokomo, Indiana, and deprives them of their property without due process of law is Acts 1977, P. L. No. 9 (Sp. Sess.), § 15 (IC 19-1-46), and is also set forth in Appendix E (at pp. A40-A41), *infra*.

QUESTIONS PRESENTED.

1. Whether, but for the enactment of IC 19-1-46 by the Indiana General Assembly after appellants' pension rights had vested, compensation paid to active first-class policemen and firemen in the form of fringe benefits in addition to their regular salaries would properly be includible in the base for the calculation of pensions payable to members of the classes represented by appellants.

2. Whether the said IC 19-1-46, which excludes compensation paid to active first-class policemen and firemen in the form

of fringe benefits in addition to their regular salaries from the base for the calculation of pensions under the police and firemen's pension statutes, impairs the obligation of appellants' contracts with the city of Kokomo, Indiana, in violation of Article I, § 10, of the Constitution of the United States and deprives appellants of their property without due process of law in violation of Section 1 of the Fourteenth Amendment to said Constitution.

STATEMENT OF THE CASE.

The police pension fund of the city of Kokomo, Indiana, was created by IC 19-1-24 (*infra*, pp. A42-A55). Pursuant thereto, any member of the police department of such city who retires after 20 or more years of active service is entitled to an annual pension equal to 50% of the salary of a first-class patrolman in such police department plus an additional 2% for each year of active service over 20 years, but the maximum pension cannot exceed 74%. A widow of a police officer is entitled to an annual pension equal to 30% of such salary, and a minor child of a deceased police officer is entitled to a pension equal to 10% of such salary. At any time that the salary of a first-class patrolman is increased or decreased, the pension payable is required to be proportionately increased or decreased. At the time the action was filed below, there were 48 retired policemen, 18 widows and 2 dependents receiving pensions from the Police Pension Fund of the city of Kokomo, Indiana.

The firemen's pension fund of the city of Kokomo, Indiana, was created by IC 19-1-37 (*infra*, pp. A56-A76). Pursuant thereto, any member of the fire force of such city who retires after 20 or more years of active service is entitled to a pension equal to 50% of the monthly wage received by a fully paid first-class fireman in such city at the time of the payment of such pension plus an additional 2% for each year of service over 20 years, but the maximum pension cannot exceed 74%. A widow of a fireman is entitled to a pension equal to 30% of such

monthly wage, and a minor child of a deceased fireman is entitled to a pension equal to 10% of such monthly pay. At the time the action was filed below, there were 48 retired firemen, 22 widows and 10 dependents receiving pensions from the Firemen's Pension Fund of the city of Kokomo, Indiana.

Since the year 1951, the city of Kokomo, Indiana, has been paying an annual cash allowance for clothing and equipment to all active members of its police and fire departments. During the years 1951 to 1959, inclusive, such allowance was $100.00 per year; during the years 1960 to 1967, inclusive, such allowance was $125.00 per year; during the years 1968 to 1971, inclusive, such allowance was $200.00 per year; during the year 1972, such allowance was $400.00; and during the years 1973 to 1976, inclusive, such allowance was $500.00 per year. Such annual payments in cash to first-class policemen and firemen by the city of Kokomo, Indiana, have never been taken into account in the computation of pension payments made to members of the appellant classes.

There are active members of the police and fire departments of the city of Kokomo, Indiana, who are not required to wear uniforms. Nevertheless, all active members of the police and fire departments receive the same annual cash allowance for clothing and equipment regardless of whether they wear uniforms.

With respect to the active members of the police and fire departments of the city of Kokomo, Indiana, who are required to wear uniforms, there has never been any requirement that they account to the city for the application of the proceeds of the annual cash allowance for clothing and equipment received by them, and there has never been any requirement that the full amount of such cash allowance be actually spent for clothing and equipment.

In the appropriation ordinances for the police and fire departments adopted by the Common Council of the city of Kokomo, Indiana, for the years 1951, 1957 and 1958, the appropriations

for the cash allowance for clothing and equipment were classified as "salaries and wages, regular", and in the ordinances for the years 1952 to 1956, inclusive, and 1959 to 1961, inclusive, such appropriations were classified as "other compensation." Since the year 1962, the appropriations for such allowances have been carried in the ordinances under the classification "current charges".

Prior to the year 1971, the active policemen and firemen in the city of Kokomo, Indiana, had a group health insurance plan. Not all policemen and firemen participated in the plan, but those that did paid 100% of their own premiums, which were deducted from their wages by the city. Starting with the year 1971, the city has contributed a portion of the premium cost of each participating policeman and fireman. During the years 1971 to 1975, inclusive, the city's contribution amounted to 49% of the premium. During the year 1976, it amounted to 75% of the premium.[4] The appropriations for the city's portion of the health insurance premiums are classified in the ordinances as "current obligations."

The percentage of the premiums of the family plan health insurance of first-class policemen and firemen paid by the city of Kokomo, Indiana, have been in amounts as follows: During the years 1971 and 1972, the sum of $286.32 per man per year; during the year 1973, the sum of $334.44 per man; during the year 1974, the sum of $405.48 per man; during the year 1975, the sum of $429.33 per man; and during the year 1976, the sum of $660.60 per man. Such contributions to health insurance premiums have never been taken into account in the computation of pension payments made to the members of the appellant classes.

The complaints for mandate were filed by the appellants in the trial court on July 2, 1975, the case was tried on June 2,

4. The trial herein was held on June 2, 1976. Subsequently, starting with the year 1977, the city increased the percentage of the premium that it pays to 99%, which amounts to $996.00 per man.

1976, and the opinion and judgment of the trial court was filed on September 16, 1976. Appellants' motion to correct errors was filed in the trial court on October 26, 1976, and overruled on November 23, 1976.[5] The appeal to the Court of Appeals of Indiana, Second District, was initiated on November 30, 1976, the record of the proceedings was filed with the clerk of the court of appeals on February 4, 1977, the appellants' brief and petition for oral argument were filed on February 8, 1977, the appellees' brief was filed on May 6, 1977, and appellants' reply brief was filed on May 11, 1977. Acts 1977, P. L. No. 9 (Sp. Sess.), § 15 (IC 19-1-46), the validity of which is drawn in question on the appeal to this Court, was not enacted until May 25, 1977. Thereafter, on October 21, 1977, the court of appeals denied appellants' petition for oral argument, and on November 8, 1977, it issued its opinion in which it gave effect to the said statute passed on May 25, 1977.

The federal question sought to be reviewed on the appeal to this Court was raised by a petition for rehearing filed in the Court of Appeals of Indiana, Second District, on November 14, 1977.[6] This was appellants' first opportunity to raise the question of the validity of Acts 1977, P. L. No. 9 (Sp. Sess.), § 15 (IC 19-1-46). Paragraph 3 of the petition for rehearing asserted:

> "3. The opinion of this court erroneously decides a new question of law by giving effect to Acts 1977, P. L. No. 9, (Sp. Sess.), § 15 (IC 19-1-46), although said statute impairs the obligation of appellants' contracts with the city of Kokomo, Indiana, in violation of Article I, Section X, of the Constitution of the United States and deprives appellants of their property without due process of law in

5. Trial Rule 59(G) of the Indiana Rules of Procedure provides that "[i]ssues which could be raised upon a motion to correct errors may be considered upon appeal only when included in the motion to correct errors filed with the trial court."

6. The petition for rehearing is set forth in Appendix C (at pp. A29-A31), *infra*. It was filed pursuant to Appellate Rule 11(A) of the Indiana Rules of Procedure. The said rule is set forth in Appendix F (at p. A77), *infra*.

violation of Section I of the Fourteenth Amendment to said Constitution."

On November 17, 1977, appellants' petition for rehearing was denied by the court of appeals without opinion.[7]

On November 28, 1977, appellants' petitioned the Supreme Court of Indiana to transfer the cause to that court for review.[8] Paragraph 7 of the petition to transfer asserted:

> "7. The opinion of the court of appeals erroneously decides a new question of law by giving effect to Acts 1977, P. L. No. 9 (Sp. Sess.), § 15 (IC 19-1-46), although said statute impairs the obligation of appellants' contracts with the city of Kokomo, Indiana, in violation of Article I, Section X, of the Constitution of the United States and deprives appellants of their property without due process of law in violation of Section I of the Fourteenth Amendment to said Constitution."

On February 16, 1978, appellants' petition to transfer was denied by the Supreme Court of Indiana without opinion.[9]

THE QUESTIONS PRESENTED ARE SUBSTANTIAL.

The statute of the State of Indiana, whose validity is involved on this appeal, was enacted for the purpose of influencing the

7. The order denying the petition for rehearing is set forth in Appendix C (at p. A32), *infra*. When a petition for rehearing does not properly present any question, it will be dismissed rather than denied. *Automobile Underwriters, Inc.* v. *Smith*, 241 Ind. 302, 171 N. E. 2d 823 (1961).

8. The petition to transfer is set forth in Appendix C (at pp. A33-A36), *infra*. It was filed pursuant to Appellate Rule 11(B) of the Indiana Rules of Procedure. The said rule is set forth in Appendix F (at pp. A77-A80), *infra*. Argument in support of a petition to transfer cannot be included in the petition itself but must be set forth in a separate, supporting brief, which is optional. *Deckard* v. *Adams*, 246 Ind. 123, 203 N. E. 2d 303 (1965). A brief in support of the petition to transfer was filed by appellants in this case.

9. The order denying the petition to transfer is set forth in Appendix C (at p. A37), *infra*.

decision in this and other similar pending cases.[10] The Indiana legislature sought to direct the Indiana courts in the interpretation of the existing police and firemen's pension statutes and, by the result in this case, succeeded in its endeavor.

In *Stockdale* v. *Atlantic Ins. Co.*, 20 Wall, 323 (1874), this Court defined the power of the legislature to interpret existing statutes as follows:

> "Both in principle and authority it may be taken to be established, that a legislative body may by statute declare the construction of previous statutes so as to bind the courts in reference to all transactions occurring after the passage of the law, and may in many cases thus furnish the rule to govern the courts in transactions which are past, *provided no constitutional right of the party concerned is violated*. * * *" (Emphasis added.) (20 Wall. at 331.)

The Court went on to say:

> "* * * [I]t may be conceded that [a legislature] cannot, under cover of giving a construction to an existing or an expired statute, invade private rights, with which it could not interfere by a new or affirmative statute." (20 Wall. at 332.)

In the case at bar, appellants' rights to their pensions in accordance with IC 19-1-24 and IC 19-1-37 had fully vested, either by retirement or on death of the member in the case of widows and dependents, prior to the enactment of IC 19-1-46. Appellants' pension rights, therefore, are contract obligations of the city of Kokomo, Indiana, which cannot constitutionally be diminished or otherwise adversely affected by subsequent legislation. *Pennie* v. *Reis*, 132 U. S. 464, 471 (1889).

Appellants' pensions are required to fluctuate as the pay of active policemen and firemen increases or decreases. Thus, the

10. At the time of the enactment of Acts 1977, P. L. No. 9 (Sp. Sess.), § 15 (IC 19-1-46), similar cases were pending involving the pension rights of retired policemen and firemen and of widows and dependents of deceased policemen and firemen in a number of Indiana cities, including Indianapolis, Peru, Muncie and Marion.

police pension statute in IC 19-1-24-3(2), (3) and (4) provides:

> "At any time that the salary of a first-grade patrolman is increased or decreased, the pension payable hereunder shall be proportionately increased or decreased."

The same result is achieved in the firemen's pension statute by the language in IC 19-1-37-14(a) and (b) that gears pensions to a percentage "of the monthly wage received by a fully paid first class fireman in such city *at the time of the payment of such pensions.*" (Emphasis added.)

The obvious reason for adjusting pensions as the compensation of active policemen and firemen rises or falls is to protect the purchasing power of the pension. As the court in *Abbott* v. *City of Los Angeles*, 178 Cal. App. 2d 204, 3 Cal. Rrpt. 127 (1960), said:

> "* * * [T]he primary purpose of the fluctuating pension plan * * * is to guarantee the pensioner or his widow a fairly constant standard of living despite the inflationary tendencies of the economy. * * *" (3 Cal. Rptr. at 134.)

The Indiana cases have heretofore consistently protected the pensioner's right to have his pension computed on the basis of the total compensation paid to first-class policemen and firemen. In *Kilfoil* v. *Johnson*, 135 Ind. App. 14, 191 N. E. 2d 321 (1963), the issue was whether the additional payments for longevity over and above the regular salary payments made by the city of Vincennes to first-class firemen should be considered as part of the monthly wage of first-class firemen for the purpose of pension computations. The court said:

> "We have carefully reviewed each pertinent section of the statute pertaining to the issues involved before the trial court that is now before us and believe that they are clear and unambiguous in their context.* * *
>
> "We further are of the opinion, after reviewing the trial court's findings and judgments, that the trial court correctly construed and interpreted said statutes." (135 Ind. App. at 21.)

The findings and judgment of the trial court included the following:

> "* * * [T]hat any monthly compensation or monthly payments, however designated, paid by said City to a first class fireman are and do constitute a portion of said fireman's monthly wages although a portion of the monthly wages is designated by some name other than a regular salary, as such additional compensation is, in truth and in fact, to be included and considered as a portion of the monthly wage.
>
> "That a fully paid first class fireman is that first class fireman receiving the highest monthly wage or monthly compensation being paid to any first class fireman working in the same Fire Department and City as himself.
>
> "That a fully paid first class fireman is that fireman receiving the maximum monthly compensation, or monthly wage, paid to any first class fireman working in the same Fire Department and City as himself." (135 Ind. App. at 19.)

Kilfoil was followed and the police pension statute was interpreted in a similar fashion in *City of Vincennes* v. *McCarter*, 142 Ind. App. 493, 236 N. E. 2d 76 (1968), and in *Orban* v. *Allen*, 143 Ind. App. 513, 241 N. E. 2d 378 (1968).[11]

In Official Opinion No. 35, 1973 O. A. G. p. 108,[12] the Attorney General of Indiana concluded, on the basis of the foregoing Indiana cases, that "clothing allowances and incentive money bonuses for educational achievement by a policeman may be considered as increases in salary to a first-class patrolman for the purpose of computing pension benefits of policemen," and that "such bonuses and allowances might then be taxable in accordance with federal and state income tax

---

11. In *City of Vincennes* v. *McCarter*, the court said that "the pensions should have been computed on the basis of the highest paid first class patrolman based upon applicable evidence." (142 Ind. App. at 496.)

12. The full text of Official Opinion No. 35 is set forth in Appendix B, *infra*, pp. A25-A27.

laws."[13] Since the rendition of this opinion by the Attorney General, the city of Evansville, Indiana, has included the clothing allowance paid to first-class policemen and firemen in the calculation of pensions.

This was the posture of the Indiana law when the legislature enacted Acts 1977, P. L. No. 9 (Sp. Sess.), § 15 (IC 19-1-46), declaring "that it has never been the intention of the general assembly that remuneration or allowances for fringe benefits, * * * insurance, [or] clothing * * * be used in the calculation of benefits under * * * IC 19-1-24, * * * or IC 19-1-37." But as this Court said in *Town of Koshkonong* v. *Burton*, 104 U. S. 668 (1882), concerning a similar statute:

> " * * * [T]he utmost effect to be given to a subsequent legislative declaration, as to what was the proper meaning of the statutes which had thus been the subject of judicial construction, would be to regard it as an alteration of the existing law in its application to future transactions, * * *." (104 U. S. at 679.)

The opinion of the court of appeals purports to recognize that a legislative declaration, such as is contained in Acts 1977, P. L. No. 9 (Sp. Sess.), § 15 (IC 19-1-46), is not binding on the courts, but it goes on to state that such legislative declarations "are entitled to respectful consideration whenever the meaning of a statute is in doubt." (*Infra*, pp. A7-A8, notes 5 and 6.) Although the court in *Kilfoil* found the pension statutes "clear and unambiguous in their context", the court now found "that judicial interpretation of the statutory language is warranted because its meaning is unclear." (*Infra*, pp. A5-A6.) There can, therefore, be no doubt that the court of appeals gave effect to Acts 1977, P. L. No. 9 (Sp. Sess.), § 15, in reaching its decision. Thus, the opinion states:

13. In the case at bar, the clothing allowance paid by the city of Kokomo would constitute gross income to the recipient as defined in 26 U. S. C. § 61. *Accord, Commissioner of Internal Revenue* v. *Kowalski*, ... U. S. ....., 54 L. Ed. 2d 252 (1977). However, the city-paid portion of health insurance premiums would be excluded from gross income by virtue of 26 U. S. C. § 106.

> "Fortunately, we are not without some guidance in ascertaining which of these alternative approaches the General Assembly intended to adopt. Subsequent to the perfection of this appeal, the Indiana General Assembly amended the pension statutes in several respects pertinent to the issues under consideration here." (*Infra*, p. A7.)

And in rejecting the official opinion of the Attorney General, 1973 O. A. G. No. 35, p. 108, that the clothing allowance should be included in the calculation of pension payments, the court of appeals states:

> "* * * The recent legislative amendments to the pension provisions indicate just the opposite." (*Infra*, p. A13.)

While the court of appeals purported to place its decision upon a construction of the language contained in IC 19-1-24 and IC 19-1-37,[14] it also expressly relied on Acts 1977, P. L. No. 9 (Sp. Sess.), § 15, to some extent. This Court, however, is not limited to the language of the opinion below in determining whether effect has been given to the statute complained of. In *Indiana ex rel. Anderson* v. *Brand*, 303 U. S. 95 (1938), this Court noted that, in most cases under the contract clause of the Constitution, "the question is as to the existence and nature of the contract and not as to the nature of the law which is supposed to impair it." (303 U. S. at 100.) The Court went on to state:

> "On such a question, one primarily of state law, we accord respectful consideration and great weight to the views of the State's highest court but, in order that the constitutional mandate may not become a dead letter, we are bound to decide for ourselves whether a contract

14. Since *Kilfoil* v. *Johnson*, 135 Ind. App. 14, 191 N. E. 2d 321 (1963); *City of Vincennes* v. *McCarter*, 142 Ind. App. 493, 236 N. E. 2d 76 (1968); and *Orban* v. *Allen*, 143 Ind. App. 513, 241 N. E. 2d 378 (1968), involved longevity pay rather than clothing allowance or insurance premiums, the court of appeals limited them to their facts. It admitted that the cases contain language that "could support a more expansive reading of the term 'salary' ", but stated that "the language is at best ambiguous." (*Infra*, pp. A9-A10.)

was made, what are its terms and conditions, and whether the State has, by later legislation, impaired its obligation. This involves an appraisal of the statutes of the State and the decisions of its courts." (303 U. S. at 100.)

It results, therefore, that the nature of the case at bar and of the rulings of the court below was such as to bring the case within the jurisdiction of this Court. As was said in *Columbia Railway, Gas & Electric Co.* v. *South Carolina*, 261 U. S. 236 (1923), one of the cases cited to sustain the jurisdiction:

> "But, although the state court may have construed the contract and placed its decision distinctly upon its own construction, if it appear, upon examination, that, in real substance and effect, force has been given to the statute complained of, our jurisdiction attaches.* * *" (261 U. S. at 245.)

Whether or not the construction placed upon IC 19-1-24 and IC 19-1-37 by the court below was correct is a question that touches upon the merits and not upon the jurisdiction of this Court. *Detroit United Railway* v. *Michigan*, 242 U. S. 238, 247-248 (1916). The question of the proper construction of IC 19-1-24 and IC 19-1-37 is clearly so substantial as to require plenary consideration, with briefs on the merits and oral argument, for its resolution.

It has been laid down in numerous Indiana cases that the police and firemen's pension statutes should be liberally construed in favor of those intended to be benefited by them.[15] Since appellants are retired members and widows and dependents of former members of the police and fire departments of the city of Kokomo, Indiana, who are entitled to pension payments pursuant to the provisions of IC 19-1-24 and 19-1-37, it is

15. *State ex rel. Bolden* v. *Johnstone*, 211 Ind. 281, 6 N. E. 2d 706 (1937); *State ex rel. Clemens* v. *Kern*, 215 Ind. 515, 20 N. E. 2d 514 (1939); *Schock* v. *Chappell*, 231 Ind. 480, 109 N. E. 2d 423 (1952); *Klamm* v. *State ex rel. Carlson*, 235 Ind. 289, 126 N. E. 2d 487 (1955); *Kilfoil* v. *Johnson*, 135 Ind. App. 14, 191 N. E. 2d 321 (1963); *Orban* v. *Allen*, 143 Ind. App. 513, 241 N. E. 2d 378 (1968).

clear that they are the persons intended to be benefited and that the statutes must be liberally construed in their favor. Therefore, if the two pension statutes are susceptible of a construction that would allow compensation paid to first class policemen and firemen in the form of fringe benefits to be included in the computation of pension payments made to appellants, then the statutes must be so construed.

The opinion of the court of appeals finds that the statutes are, indeed, susceptible of such a construction, stating:

> "In a broad sense, salary refers to compensation for services rendered and thereby embraces any form of remuneration paid in exchange for services. Yet salary also has a more restricted meaning as a category of or special type of compensation, i.e., a fixed amount payable at regular intervals for services rendered. The word thus lends itself to different meanings, depending upon the context in which it is used.* * *
>
> "A broad interpretation which equates salary with compensation in general would compel a result in favor of appellants. These insurance contributions represent compensation to each participating employee in the form of a fringe benefit that supplements his regular salary. The health insurance program is not a mere gratuity. As added inducement to employment, it is an integral part of the compensation package. * * *
>
> "By comparison, the more restricted meaning of salary would compel the opposite result. Employer insurance programs and other fringe benefits are not salary in the sense of a fixed amount payable [at] stated intervals. They represent another form of compensation distinct from the employee's *regular salary*. * * *" (Emphasis in original.) (*Infra*, p. A6)

Although required by the prior Indiana cases to liberally construe the pension statutes in favor of those intended to be benefited thereby, *i.e.*, the appellants, the court of appeals eschewed the broad, or liberal, construction stated in its opinion and adopted a strict construction adverse to appellants. It gave three reasons for so doing, but none has merit.

The court of appeals first referred to Acts 1977, P. L. No. 9 (Sp. Sess.), as giving guidance in ascertaining the legislative intent. It states that "[s]ubsequent to the perfection of this appeal, the Indiana General Assembly amended the pension statutes in several respects pertinent to the issues under consideration here." It noted that Section 1 "specifically defines the '[s]alary of a first-class patrolman' to exclude 'remuneration or allowances for fringe benefits, incentive pay, holiday pay, insurance, clothing, automobiles, firearms, education, overtime, or compensatory time off' " and that "Section 2 defines the '[s]alary of a first-class firefighter' in the same manner." (*Infra*, p. A7.) The court of appeals, however, completely misapprehended the effect of Sections 1 and 2 of Acts 1977, P. L. No. 9 (Sp. Sess.). Such sections in no way amend or affect any of the provisions of IC 19-1-24 and IC 19-1-37, the pension statutes involved in this case. On the contrary, Section 1 amends IC 19-1 by adding new chapter 17.8 creating the "1977 Police Officers' Pension and Disability Fund", and Section 2 amends IC 9-1 by adding new chapter 36.5 creating the "1977 Firefighters' Pension and Disability Fund." Only police officers and firefighters hired for the first time on or after May 1, 1977, and active police officers and firefighters hired prior to that date who elect to convert their membership from existing funds to the new funds are members of the new funds. The appellants' pensions continue to be the obligation of the existing funds created pursuant to IC 19-1-24 and IC 19-1-37.[16]

In any event, unlike pensions payable under existing pension funds, the exclusion of fringe benefits from the calculation of pension benefits payable under the new 1977 pension funds will not be detrimental to pensioners. The new 1977 funds compute pensions on the basis of a percentage "of the monthly salary of a first-class patrolman [or firefighter] in the year the member ended

16. To be sure, the court of appeals is correct in stating that Section 15 "further attempts to clarify the legislative intent with respect to prior law" (*Infra*, p. A7), and it is such attempt that gives rise to the constitutional question presented on this appeal.

his active service." IC 19-1-17.8-9 and IC 19-1-36.5-9. The pensions do not fluctuate as the salary of active policemen and firemen is increased or decreased. Instead, the new funds provide for annual cost of living adjustments of pensions geared to the consumer price index prepared by the United States Department of Labor, but no monthly benefit may be reduced below the amount of the first monthly benefit received. IC 19-1-17.8-13 and IC 19-1-36.5-13. In contrast, if fringe benefits are excluded from the computation of pensions payable under IC 19-1-24 and IC 19-1-37, then appellants have no protection against price inflation or even against an absolute decrease in their pension payments.

The opinion of the court of appeals will permit cities to defeat the purpose of the fluctuating pension plan by compartmentalizing the compensation of active policemen and firemen and computing pensions on only a portion of the true compensation paid. In this regard, the opinion states:

> "One final objection by appellants requires attention. They argue that the interpretation which we have adopted permits the City to increase compensation to active members by way of additional clothing allowances and fringe benefits without increasing pension benefits. In the words of the Michigan Court of Appeals in *Banish, supra*, 157 N.W.2d at 448, this 'would permit the city to keep the retirees' pay constant—or, indeed, to effect only reductions and no increases—by simply adopting the correct nomenclature and dividing the pay of active service employees into categories plausibly packaged and labeled.'
>
> "We are not unmindful that this is a possible consequence of today's decision. Yet the policy question suggested by the possibility of subterfuge is a matter best left to the General Assembly. * * *" (*Infra*, pp. A14-A15.)

It is clear that the exclusion of fringe benefits from the definition of "salary" under the new 1977 pension funds does not have the prejudicial consequences for pensioners that a similar exclusion has under IC 19-1-24 and IC 19-1-37.

The court of appeals next relied on the statutory language of IC 19-1-24 and IC 19-1-37 to support the strict construction adopted by the opinion. In this regard, the opinion states:

> "More importantly, the statutory language in force at the time dictates the conclusion that salary is used in a restricted sense and does not include the City's contributions to the group insurance plan.
>
> "The interchangeable use of the words 'salary' and 'monthly pay' ('monthly wage') signifies that the benefit formula has reference to a first-class patrolman's or fireman's *regular salary*, exclusive of fringe benefits and other forms of added compensation. The contrary suggestion that this variation in terminology has no significance ignores the elementary rule of statutory construction that where possible each word be given effect. * * *" (Emphasis in original.) (*Infra*, p. A8.)

With respect to the clothing allowance, the opinion states:

> "Our conclusion that this annual cash allowance for clothing is not salary within the meaning of the pension provisions follows from an examination of the respective statutes. As we have interpreted the term here, 'salary' does not include all forms of compensation, only that remuneration which is paid on a regular and periodic basis in exchange for services." (*Infra*, p. A12.)

Thus, the court of appeals deduced the legislative intent from isolated clauses of the pension statutes and did not construe such statutes in their entireties. This was error. Viewing each of the two pension statutes as a whole, it is clear that the references to percentages of "the monthly wage received by a fully paid first-class fireman" and "the monthly pay of a first-class patrolman" were made not because the compensation of policemen and firemen is determined on a monthly basis but because pensions are paid in monthly instalments.

Compensation of policemen and firemen is determined on an annual basis by ordinance.[17] In this regard, IC 18-1-11-2 provides as follows:

> "* * * The *annual pay* of all policemen, firemen and other appointees shall be fixed by ordinance of the common council; and it shall be lawful in such ordinance to grade the members of such forces and to regulate their pay not only by rank, but by their length of service. * * *" (Emphasis added.)

There is no requirement that such annual pay be disbursed in monthly instalments as opposed to some other pay period. In fact, the record herein discloses that firemen in the city of Kokomo are paid on a weekly basis.

On the other hand, while the two pension statutes specify that pensions shall be paid in monthly instalments, they are also clear that such pensions are computed on an annual basis. In this regard, IC 19-1-24-3(3) explicitly states that "[s]uch pensions shall be computed on an annual basis but shall be paid in twelve [12] equal monthly instalments." So also, monthly payments are specified in IC 19-1-37-13(a) and (c) and in 19-1-37-14(a). Most importantly, IC 19-1-24-2(b) makes it the duty of the board of trustees of the police pension fund to prepare annual estimates of receipts and disbursements and "a certified statement showing the name, age and the date of retirement of each retired member and the monthly and yearly amount of the payment to which such retired member is entitled." Likewise, IC 19-1-37-16(a) makes it the duty of the board of trustees of the firemen's pension fund to prepare annual estimates of receipts and disbursements and "a certified statement showing the name, age and the date of retirement of each retired member and the monthly and yearly amount of the payment to which such retired member is entitled." The intent that pensions be

17. Annual appropriations for regular salaries, clothing allowances, health insurance contributions and all other fringe benefits are made in a single ordinance for the police department and a single ordinance for the fire department.

computed on an annual basis but paid in monthly instalments could not be clearer.

There is, therefore, no ambiguity in either pension statute. The opinion of the court of appeals concedes that "a broad interpretation which equates salary with compensation in general would compel a result in favor of appellants." But its conclusion that "the interchangeable use of the words 'salary' and 'monthly pay' ('monthly wage') signifies that the benefit formula has reference to a first-class patrolman's or fireman's *regular salary*, exclusive of fringe benefits and other forms of added compensation" is clearly unsupportable. In using the terms "monthly wage" and "monthly pay", the statutes obviously have reference to one-twelfth of the total annual compensation of first-class policemen and firemen, since the compensation of active policemen and firemen is established on an annual basis. Pensions are also established on an annual basis but paid in monthly instalments. Each pension instalment, therefore, is a percentage of one-twelfth of the total annual compensation, i.e., the monthly wage or pay, of a first-class patrolman or fireman. The rule of statutory construction that where possible each word be given effect is fully satisfied by a liberal construction of the statutes in favor of appellants.

The final reason given by the court of appeals for its adoption of a strict construction of the pension statutes adverse to appellants was the fiscal impact that a liberal construction would have. In this regard, the opinion candidly states:

> "Also, we cannot disregard the catastrophic effect which appellants' suggested construction would have upon the budgets of Indiana cities. Inclusion of this fringe benefit in the formula for computing pension payments would necessarily result in the inclusion of all other fringe benefits. * * *" (*Infra*, p. A8.)

Thus, the court of appeals has resorted to a strict construction of the police and firemen's pension statutes as a source of fiscal relief. However, this Court has made it clear that neither

a reluctance to raise taxes nor a great need for economy is an excuse for repudiating governmental contractual obligations. *United States Trust Co.* v. *New Jersey*, ... U. S. ....., 52 L. Ed. 2d 92 (1977); *Lynch* v. *United States*, 292 U. S. 571 (1934). It is manifestly unjust to place the entire burden of fiscal relief on the pensioners. Active policemen and firemen should also bear their share. Nevertheless, the strict construction of the police and firemen's pension statutes adopted by the opinion of the court of appeals permits cities to increase the total compensation package of active policemen and firemen without having to increase pension payments. This is clearly contrary to the unambiguous mandate of the two statutes that pensions should rise proportionately when the compensation of active policemen and firemen rises.

Although the court of appeals recognized that its decision creates a potential for abuse, it dismissed the matter with the observation that "the policy question suggested by the possibility of subterfuge is a matter best left to the General Assembly." (*Infra*, pp. A14-A15) But that is like assigning the job of guarding the hen house to the fox. In Note, *Public Employee Pensions In Times Of Fiscal Distress*, 90 Harv. L. Rev. 992 (1977), it is said:

> "In recent years, public employee pension funds have expanded dramatically both in their scope and their impact. * * * This expansion, however, has generally taken place apart from any legislatively or judicially imposed controls, with the result that, according to a 1976 congressional task force, the 'unclear legal status of the participants' rights' has become a 'distinguishing characteristic of governmental pension plans.' The problem is not simply one of theoretical lack of clarity, however. The same task force also found that '[t]he absence of any external independent review has perpetuated a level of employer control and attendant potential for abuse unknown in the private sector.'
>
> "This 'potential for abuse' is becoming a reality in many areas. With public employee pension systems absorbing

an increasingly large share of state and local revenues, financially troubled governments have begun increasingly to look to these systems as a source of fiscal relief. In some instances, legislatures have sought directly to alter the benefit and eligibility structure of a government's pension program; in others, legislatures have sought to influence the fund's investment in government obligations. Whatever their form, such efforts clearly call into question the protection to be afforded to the public employee in his pension. * * *" (90 Harv. L. Rev. at 992-993.)

Thus, while Acts 1977, P. L. No. 9 (Sp. Sess.), § 15 (IC 19-1-46), was purportedly repudiated by the court of appeals as binding legislation, it was adopted by construction and was found to express the meaning of IC 19-1-24 and IC 19-1-37. But, as demonstrated, such a construction of IC 19-1-24 and IC 19-1-37 is patently wrong.

CONCLUSION.

For the reasons stated, probable jurisdiction should be noted and the case set down for an early hearing.

Respectfully submitted,

DONALD A. SCHABEL,
111 Monument Circle,
Suite 1200,
Indianapolis, Indiana 46204,
(317) 636-5511,
Attorney for Appellants.

PAUL I. HILLIS,
3415 South LaFountain Street,
Atrium Building,
Suite 1,
Kokomo, Indiana 46901,
(317) 453-2374,
Of Counsel.

APPENDIX A.

OPINIONS BELOW.

IN THE COURT OF APPEALS OF INDIANA
Second District

No. 2-1276 A 448

THOMAS J. HILLIGOSS and KAY BERRYMAN, on behalf of themselves and all others similarly situated,
Appellants (Plaintiffs Below),

vs.

ARTHUR J. LADOW, as Mayor of the City of Kokomo, Indiana; ELVA W. LADOW, as Treasurer of Howard County, Indiana; KEITH ANDERSON, as Chief of Police of the City of Kokomo, Indiana; JERRY C. WILSON, HENRY MELTON, LAWRENCE R. DARLIN, ROBERT E. LYTLE, JERRY K. CODY and HAROLD P. BRADEN, as members of the Board of Trustees of the Police Pension Fund of the City of Kokomo, Indiana; ROBERT E. MASSEY, RALPH W. NEAL, DOUGLAS HOGAN, ROBERT M. LOUKS, JAMES T. PAPACEK, JAMES S. SUTTERFIELD, JOHN W. KENNEDY, JAMES MANNION and STEPHEN DAILEY, as members of the Common Council of the City of Kokomo, Indiana,
Appellees (Defendants Below).

GERALD SWING and MARGARET TOMLINSON, on behalf of themselves and all others similarly situated,
Appellants (Plaintiffs Below),

vs.

ARTHUR J. LADOW, as Mayor of the City of Kokomo, Indiana; ROBERT E. DONAGHUE, as Chief of the Fire Force of the City of Kokomo, Indiana; WILLIAM D. CARTER, RAYMOND D. JOHNSON, MORRIS J. NICHOLS, ROBERT M. COX and WILLIAM F. HUDELSON, as members of the Board of Trustees of the Firemen's Pension Fund of the City of Kokomo, Indiana; ROBERT E. MASSEY, RALPH W. NEAL, DOUGLAS HOGAN, ROBERT M. LOUKS, JAMES P. PAPACEK, JAMES S. SUTTERFIELD, JOHN W. KENNEDY, JAMES MANNION and STEPHEN DAILEY, as members of the Common Council of the City of Kokomo, Indiana,
Appellees (Defendants Below).

Filed
November 8, 1977
Billie R. McCullough
Clerk of the
Indiana Supreme and
Court of Appeals

Appeal from the Howard Superior Court, Division No. 1.

The Honorable
William E. Lewis,
Judge.

SULLIVAN, *P.J.*

The issues upon appeal involve health insurance benefits and clothing allowance payments and whether they constitute an inclusive factor upon which police or fire department pensions must be computed.

The case originally involved two separate class actions for mandate. Appellants Hilligoss and Berryman filed suit on behalf of themselves and all others similarly situated who are entitled to benefits from the Policemen's Pension Fund of the City of Kokomo pursuant to I. C. 19-1-24-1 et seq. (Burns Code Ed. 1974). The class was defined as comprising all retired members of the City of Kokomo Police Department and the widows and dependents of former policemen.

Appellants Swing and Tomlinson filed suit as representatives of those entitled to benefits under the Firemen's Pension Fund of the City of Kokomo pursuant to I. C. 19-1-37-1 et seq. (Burns Code Ed. 1974). Their class was similarly defined as comprising all retired members of the City of Kokomo Fire Department and the widows and dependents of former firefighters.

The complaint in each action sought an order from the trial court directing the Board of Trustees of the respective Pension Funds and the Common Council of the City of Kokomo to include, in the base for computation of pension benefits, certain items of compensation which theretofore had been excluded and to correct the alleged corresponding deficiencies in past pension payments.

Because of the similarity of issues, the two actions were consolidated for trial. Submission was to the trial court without jury and on September 16, 1976 a judgment was entered. Appellants received an adverse determination with respect to two items of compensation and this forms the basis for their appeal. The trial

court concluded that the statutory formula for computing pension benefits does not include the health insurance benefits or clothing allowance payments provided by the City.

We affirm. As a matter of law, we hold that these two items are not part of the "salary" received by a first-class patrolman or "monthly wage" received by a first-class fireman within the meaning of the applicable pension provisions.

I.

Health Insurance

We deal first with the City of Kokomo's health insurance program. The City maintains a group plan of family health insurance and makes contributions thereto on behalf of those policemen and firemen who elect to participate in the program.[1] The authority for the program is not apparent from the record. The trial court's decision notes that, there being no statutory authorization, the program is "probably founded upon a contract or possibly a city ordinance".

The police pension fund, on the other hand, is created by statute. I. C. 19-1-24-1 (Burns Code Ed. 1974). The third section of the chapter, I. C. 19-1-24-3 (Burns Code Ed. 1974), deals with the pension benefits payable to policemen in all but first-class cities and reads, in relevant part, as follows:

> ". . . such fund shall be used and devoted to the following purposes:
>
> * * * * *
>
> (3) To any member of the police department of such city who retires from active service after twenty [20] or more years of such active service by such member, an

1. Under the prescribed arrangement, the City pays a percentage of the required premiums on behalf of the participating policemen and firemen who then pay the remainder. The program is not mandatory. Yet those who do not participate do not receive a comparable benefit. For reasons hereinafter discussed, the voluntary character of the program has no bearing on our decision.

annual pension equal to fifty per cent [50%] of the *salary* of a first-grade patrolman in such police department, plus two per cent [2%] of such first-grade patrolman's salary for each year of service of such retired member over twenty [20] years, provided that such pension shall not exceed in any year an amount greater than seventy-four per cent [74%] of the salary of a first-class patrolman. Such pensions shall be computed on an annual basis but shall be paid in twelve [12] equal monthly instalments. At any time that the salary of a first-grade patrolman is increased or decreased, the pension payable hereunder shall be proportionately increased or decreased.

* * * * *

(4) To the payment of funeral benefits to the heirs or estate of any active or retired member of the police force who has suffered death from any cause, an amount fixed by ordinance, but no less than six hundred dollars [$600].

Except as herein otherwise provided, to the payment to the widow of any police officer who may die under the circumstances set out above, an amount fixed by ordinance, but not less than a sum equal to thirty per cent [30%] of the *monthly pay* of a first-class patrolman per month to continue during her life while unmarried, and the payment to each child of any such deceased police officer under the age of eighteen [18] years, an amount fixed by ordinance but no less than a sum equal to ten per cent [10%] of the monthly pay of a first-class patrolman per month to each of such children, such payments to a minor child or children under the age of eighteen [18] years to continue only so long as such child or children shall remain under the age of eighteen [18] years;

* * * * *

At any time that the *salary* of a first-grade patrolman is increased or decreased, the pension payable hereunder shall be proportionately increased or decreased." (Emphasis supplied)

The firemen's pension statute contains similar language, except that "salary" is used interchangeably with "monthly wage" rather than "monthly pay". I. C. 19-1-37-14 (Burns Code Ed. 1974).[2]

We note, as a preliminary matter, that judicial interpretation of the statutory language is warranted because its meaning is

---

2. The firemen's pension statute, in relevant part, provides:

"(a) The sum which shall be paid to permanently disabled members and to the widows, orphans, mothers and fathers of deceased members, shall be as follows: Upon retirement with such disability during service, a member shall receive in monthly instalments an amount equal to fifty-five per cent [55%] of the *monthly wage* received by a fully paid first-class fireman in such city at the time of the payment of such pension; and in the event of his decease while in such service of the fire force or after such retirement, the widow shall receive an amount equal to thirty per cent [30%] of the monthly wage received by a fully paid first-class fireman in such city at the time of payment of such pension; and their children under eighteen [18] years of age each shall receive an amount equal to ten per cent [10%] of the monthly wage received by a fully paid first-class fireman in such city at the time of the payment of such pension, and any mother or father of a deceased member of the fire force who is eligible for a pension, shall receive jointly an amount equal to thirty per cent [30%] of the monthly wage received by a fully paid first-class fireman in such city at the time of the payment of such pension.

* * * * *

(b) Any member of any such paid fire force who has been in such service twenty [20] years, upon making written application to the chief of such fire force, may, at his own option, without medical examination or disability, be retired from all service on such fire force, and on such retirement, the board of trustees shall authorize the payment to such retired member of a sum equal to fifty per cent [50%] of the *monthly wage* received by a fully paid first-class fireman in such city, town, township or county at the time of the payment of such pension plus two per cent [2%] of such fully paid first-class fireman's *salary* for each year of service of such retired member over twenty [20] years; Provided, That such pension shall not exceed in any year an amount greater than seventy-four per cent [74%] of the *salary* of a fully paid first-class fireman. The pension of the dependents of such retired members shall be the same in case of death after the retirement as is provided for dependents of those who die in the service, or after retirement with disability." (Emphasis supplied)

unclear.[3] The benefit formulas do not contain express inclusions or exclusions, nor can we obtain guidance from the ordinary definition of the word "salary".

In a broad sense, salary refers to compensation for services rendered and thereby embraces any form of remuneration paid in exchange for services. Yet salary also has a more restricted meaning as a category of or special type of compensation, i.e., a fixed amount payable at regular intervals for services rendered. The word thus lends itself to different meanings, depending upon the context in which it is used. *E.g., State ex rel. Shea* v. *Billheimer* (1911) 178 Ind. 83, 96 N. E. 801; *Board of School Com'rs. of Indianapolis* v. *Wasson* (1881) 74 Ind. 133; *Cowdin* v. *Huff* (1857) 10 Ind. 83. *See also,* Annot., 14 A. L. R. 2d 634; 38 Words & Phrases, "Salary", p. 44 et seq.; Webster's Third New International Dictionary (1971), p. 2003.

A broad interpretation which equates salary with compensation in general would compel a result in favor of appellants. These insurance contributions represent compensation to each participating employee in the form of a fringe benefit that supplements his regular salary. The health insurance program is not a mere gratuity. As added inducement to employment, it is an integral part of the compensation package. *See, Epmeier* v. *United States* (7th Cir. 1952) 199 F. 2d 508, 510-11.

By comparison, the more restricted meaning of salary would compel the opposite result. Employer insurance programs and other fringe benefits are not salary in the sense of a fixed amount payable as stated intervals. They represent another form of compensation distinct from the employee's *regular salary. E.g., County of Erie* v. *Hoch* (1966) 26 A. D. 2d 4, 270 N. Y. S. 2d 225, modified, 19 N. Y. 2d 854, 280 N. Y. S. 2d 584.

3. A statute which is unambiguous on its face cannot be interpreted by a court. *Indiana State Hwy. Com.* v. *White* (1973) 259 Ind. 690, 291 N. E. 2d 550; *Indiana State Board of Tax Com'rs.* v. *Holthouse Realty Corp.* (1st Dist. 1976) Ind. App., 352 N. E. 2d 535.

Fortunately, we are not without some guidance in ascertaining which of these two alternative approaches the General Assembly intended to adopt. Subsequent to the perfection of this appeal, the Indiana General Assembly amended the pension statutes in several respects pertinent to the issues under consideration here.

Acts 1977, P. L. 9 (Special Session), § 1, specifically defines the "[s]alary of a first-class patrolman" to exclude "remuneration or allowances for fringe benefits, incentive pay, holiday pay, insurance, clothing, automobiles, firearms, education, overtime, or compensatory time off." Section 2 defines the "[s]alary of a first-class firefighter" in the same manner.[4] The Act (§ 15) further attempts to clarify the legislative intent with respect to prior law by stating:

> ". . . it has never been the intention of the general assembly that remuneration or allowances for fringe benefits, incentive pay, holiday pay, insurance, clothing, automobiles, firearms, education, overtime, or compensatory time off be used in the calculation of benefits under I. C. 18-1-12, I. C. 19-1-18, I. C. 19-1-24, I. C. 19-1-25-4, or I. C. 19-1-37. . ."

While such legislative declarations are not binding on the courts,[5] they nevertheless are entitled to respectful consideration

4. The Act, approved May 25, 1977, provides that these definitions took effect May 1, 1977, subject to certain specified exceptions. We need not be concerned with this retroactive provision.

5. The expression of a subsequent legislature's opinion as to the proper construction of a statute passed by a previous legislature has no judicial force. The reasons behind this rule as presented in *Bettenbrock* v. *Miller* (1916) 185 Ind. 600, 112 N. E. 771, are worth restating. First and foremost, the responsibility for construing doubtful statutes is a judicial power which is vested exclusively in the courts of this State. Legislative interference with that judicial function is prohibited by the Indiana Constitution, Art. 3, § 1. It is furthermore the intent of the legislature that passed the act which the court seeks to ascertain, not the intent of a subsequent legislature.

whenever the meaning of a statute is in doubt.[6] *McCarnon* v. *State* (1932) 215 Ind. 157, 19 N. E. 2d 252; *Taylor* v. *State ex rel. Ogle* (1907) 168 Ind. 294, 80 N. E. 849; *State, Dept. of Revenue Gross Income Tax Division* v. *Bethel Sanitarium, Inc.* (1st Dist. 1975) Ind. App., 332 N. E. 2d 808.

More importantly, the statutory language in force at the time dictates the conclusion that salary is used in a restricted sense and does not include the City's contributions to the group insurance plan.

The interchangeable use of the words "salary" and "monthly pay" ("monthly wage") signifies that the benefit formula has reference to a first-class patrolman's or fireman's *regular salary*, exclusive of fringe benefits and other forms of added compensation. The contrary suggestion that this variation in terminology has no significance ignores the elementary rule of statutory construction that where possible each word be given effect. *City of Muncie* v. *Campbell* (2d Dist. 1973) 156 Ind. App. 59, 295 N. E. 2d 379; *Engle* v. *City of Indianapolis* (1st Dist. 1972) Ind. App., 279 N. E. 2d 827. *See also*, 2A Sutherland Statutory Construction (4th ed.) § 46.07, p. 65.

Also, we cannot disregard the catastrophic effect which appellants' suggested construction would have upon the budgets of Indiana cities.[7] Inclusion of this fringe benefit in the formula for computing pension payments would necessarily result in the inclusion of all other fringe benefits. If the statutes were intended

6. A subsequent legislative expression cannot control or influence the judicial determination when the plain language of the statute expresses a contrary meaning. *Bettenbrock* v. *Miller, supra,* [185 Ind. at 607] 112 N. E. at 774. Otherwise, particularly in a case such as this, there is the danger that the subsequent legislation may impair vested rights. *Klamm* v. *State ex rel. Carlson* (1955) 235 Ind. 289, 292-93, 126 N. E. 2d 487, 489.

7. The Court may consider the consequences of a particular construction whenever a statute is susceptible of more than one interpretation. In such cases the statute should be given a practical construction and one which avoids prejudice to the public interest. *State ex rel. Bynum* v. *La Porte Superior Court, No. 1* (1973) 259 Ind. 647, 650, 291 N. E. 2d 355, 356.

to have such far reaching consequences, the General Assembly, acting as a reasonably minded body, would surely have provided an express mandate to that effect. We would expect to find, for example, either more embracing terminology ("compensation") or a specific reference to "salary, fringe benefits, and other compensation". Instead, the General Assembly elected to employ, and retain over the years, more restrictive language. We cannot presume that this choice of wording was a futile or inadvertent gesture. *See*, 2A Sutherland Statutory Construction (4th ed.), § 45.12, p. 37.

The longevity pay cases cited by appellants do not force a contrary interpretation. Those cases merely hold that longevity pay falls within the salary formula for computing pension benefits. *City of Vincennes* v. *McCarter* (1968) 142 Ind. App. 493, 236 N. E. 2d 76; *Orban* v. *Allen* (1968) 143 Ind. App. 513, 241 N. E. 2d 378; *Kilfoil* v. *Johnson* (1963), 135 Ind. App. 14, 191 N. E. 2d 321.

They are not authority for the proposition that other forms of compensation necessarily constitute salary. Longevity pay is not merely additional compensation. Unlike fringe benefits and other forms of added compensation, longevity pay is an integral part of the individual employee's *regular salary*, whether or not the city appropriation ordinance designates it as such. I. C. 18-1-11-2 (Burns Code Ed. 1974) authorizing cities to fix salaries by ordinance provides:

> "The annual pay of all policemen, firemen and other appointees shall be fixed by ordinance of the common council; and *it shall be lawful in such ordinance to* grade the members of such services and to *regulate their pay, not only by rank, but by their length of service.*" (Emphasis supplied.)

There is language in the longevity cases which could support a more expansive reading of the term "salary". But the language

is at best ambiguous.[8] And since these cases did not have occasion to consider other forms of compensation, the broad import suggested by appellants is not self-evident, nor a necessary extension of those holdings.

Appellants also rely upon, and cite the longevity cases for, the proposition that pension statutes should be liberally construed in favor of intended beneficiaries. This rule, however, was never meant to be applied indiscriminately. It must be considered in light of the purpose underlying the pension program.

We note in this regard that the objective is not to reward policeman and firefighters per se, although that is the result or byproduct of these pension plans. Assurance of income upon retirement serves to attract competent persons to public positions and induce their loyal and continued service. This underlying goal of stimulated government efficiency is ultimately directed towards the general welfare of the taxpaying public. See generally, *Klamm* v. *State ex rel. Carlson, supra* (1955), 235 Ind. 289, 126 N. E. 2d 487. The liberal construction rule, therefore, is not a license to read into the act obligations against

8. *Kilfoil* v. *Johnson, supra,* 191 N. E. 2d at 324, quotes, with approval, the trial court's decision which stated in part:

> " 'that any monthly compensation or monthly payments, however designated, paid by said City to a first class fireman are and do constitute a portion of said fireman's monthly wages although a portion of the monthly wages is designated by a name other than a regular salary . . .' " .

Orban v. *Allen, supra,* 241 N. E. 2d at 380, refers to the holding in *Kilfoil* as follows:

> "We held that longevity pay should be included in the computation of the monthly payments on which the pensions are based."

City of Vincennes v. *McCarter, supra,* 236 N. E. 2d at 78, states that "pensions should [be] computed on the basis of the highest paid first class patrolman based upon applicable evidence."

The language quoted from the three cases is readily susceptible to the following interpretation: Where the evidence discloses that the city does regulate pay by length of service, the longevity payments are a part of regular salary, no matter how they are designated on the books.

pension trust funds and the taxpayers which the legislature did not intend. *Id.*

Having thus ascertained the legislative intent with respect to the pension provisions based on the language used therein, we attach no significance to arguably contrary interpretations which have been placed upon various federal statutes cited by appellants.

II.

Clothing Allowance.

The foregoing discussion also leads to our conclusion that, as a matter of law, the definition of "salary" for computing pension benefits does not include the so-called clothing allowance paid by the City pursuant to statute.

I. C. 19-1-10-1 (Burns Code Ed. 1974) which authorizes the allowance reads as follows:

> "All cities of the first, second, third and fourth classes having regularly organized and paid police and fire departments shall provide for use by the active members of such police and fire departments of all uniforms, clothing, arms and equipment necessary to the performance of their respective duties: Provided, That after one [1] year of regular service in said departments, any such member thereof may be required by such city to furnish and maintain all of his uniform, clothing, arms and equipment upon the payment to such member by such city an annual cash allowance of not less than two hundred dollars [$200]: Provided further, That a city of first, second, third and fourth class may credit such a uniform allowance to each individual officer as against his purchases during any calendar year and provide for the payment of any cash balance remaining at the end of the calendar year. . ."

Depending upon the context in which it is used, the term "allowance" may or may not be synonymous with salary.[9] *See,*

9. In general, a salary is always earned, whereas the term "allowance" may refer either to a gratuity or a repayment. Webster's

(Footnote continued on next page.)

e.g., State ex rel. Shea v. *Billheimer, supra,* (1911) 178 Ind. 83, 96 N. E. 801.

Our conclusion that this annual cash allowance for clothing is not salary within the meaning of the pension provisions follows from an examination of the respective statutes. As we have interpreted the term here, "salary" does not include all forms of compensation, only that remuneration which is paid on a regular and periodic basis in exchange for services.

Admittedly, the clothing allowance is a form of compensation in that it does relieve the recipient of the necessity of making clothing expenditures from his usual remuneration. But the annual cash payment is supplemental to, and not an integral part of, the employee's *regular salary*. The statutory scheme underscores this distinction in the very existence of a separate clothing allowance authorization. I. C. 19-1-5-1 (Burns Code Ed. 1974) establishes the minimum salary compensation per month for policemen and firemen. We then find I. C. 19-1-10-1, supra, in a separate chapter, setting forth provision for additional sums annually for clothing and equipment.

Moreover, an analysis of the intent and purpose behind I. C. 19-1-10-1, *supra,* indicates that the clothing allowance is not paid in exchange for services—even though recipients need not actually use the full amount for the materials designated or otherwise provide an accounting for their expenditures. Under the terms of the statute, the City can require its police and fire personnel to provide their own clothing only upon payment of the annual cash allowance. The allowance is thus intended to help the recipient offset whatever cleaning, repair, and replacement costs he or she is likely to incur in furnishing and maintaining uniform, clothing, arms and equipment. Although some recipients may not use the full allotment for these

(Footnote continued from preceding page.)
Third New International Dictionary (1971), p. 58, defines allowance as "a sum granted as reimbursement or a bounty, or as appropriate for any purpose . . .; a fixed and, usually, restricted quantity."

purposes,[10] the amount that is unused bears no relation to the recipient's services. It is simply a reward for conserving those items, with the amount varying in direct relation to the recipient's conservation efforts.[11]

The fact that the City appropriation ordinances have at various times classified the annual cash allowance under the headings of "salaries and wages, regular" and "other compensation" is immaterial. The wording of a municipal ordinance is not determinative of the General Assembly's intent in enacting legislation. Our analysis of I. C. 19-1-10-1, *supra,* leads to the conclusion that the General Assembly did not intend for the clothing allowance to constitute salary within the meaning of the pension statutes.

We are aware that an official opinion of the Attorney General expresses a contrary interpretation. 1973 O. A. G. No. 35, p. 108. However, such opinions are not judicially binding and there is no indication here that the General Assembly meant to acquiesce in the construction given by the Attorney General. *Cf., State Board of Tax Com'rs.* v. *Methodist Home for the Aged of the Indiana Conference of the Methodist Church, Inc.* (1968) 143 Ind. App. 419, 241 N. E. 2d 84. The recent legislative amendments to the pension provisions indicate just the opposite.

10. Appellants also emphasize that the allowance is paid without regard to whether the recipient is required to wear a uniform. Because some recipients do not wear uniforms, argue appellants, the allowance must be regarded as added salary. We fail, however, to see the logic of this argument. The nonuniformed recipient incurs expenses in furnishing and maintaining the clothes he wears on the job and has as much need of the clothing allowance as does the uniformed recipient. The statute plainly contemplates this by referring not only to "uniform[s]" but to "*clothing,* arms, and equipment" as well.

11. This view of the intent and purpose behind the clothing allowance authorization is in no way affected by any of the suggested interpretations of I. C. 19-1-10-2 (Burns Code Ed. 1974) which defines the property rights in the clothing and equipment provided by the City.

We are also cognizant that cases from other jurisdictions provide support for the statutory construction urged by appellants. The two cases, cited by appellants, are the only reported cases disclosed by our research which deal with clothing allowances and pension benefits.

In *Anderson* v. *City of Long Beach* (1959) 171 Cal. App. 2d 699, 341 P. 2d 43, the clothing allowance was authorized by a city ordinance which provided for payments to be made on the basis of on-duty days without regard to the actual cost of the clothing worn. The court concluded that, even though the ordinance was not designated as a pay ordinance, the payments it authorized were actualy treated by the city as "salary" in the sense of remuneration for services rendered. Although *Banish* v. *City of Hamtramck* (1968) 9 Mich. App. 381, 157 N. W. 2d 445, reached the opposite result, the determining factor was the same. The court held that "pay", within the meaning of the city charter fixing pension benefits, did not include a uniform allowance which was merely reimbursement for actual out-of-pocket expense.

Suffice it to say, our preceding analysis of the legislative intent underlying I. C. 19-1-10-1, *supra,* simply rejects the proposition that an allowance not confined to reimbursement for actual expense is necessarily related to the recipient's services and a part of his regular salary.

One final objection by appellants requires attention. They argue that the interpretation which we have adopted permits the City to increase compensation to active members by way of additional clothing allowances and fringe benefits without increasing pension benefits. In the words of the Michigan Court of Appeals in *Banish, supra,* 157 N. W. 2d at 448, this "would permit the city to keep the retirees' pay constant—or, indeed, to effect only reductions and no increases—by simply adopting the correct nomenclature and dividing the pay of active service employees into categories plausibly packaged and labeled".

We are not unmindful that this is a possible consequence of today's decision. Yet the policy question suggested by the possibility of subterfuge is a matter best left to the General Assembly. Our role in interpreting a statute is a limited one and in the end we must defer to the well established boundaries of judicial decisionmaking. The Supreme Court enunciated this principle in *State ex rel. Bynum* v. *LaPorte Superior Court, No. 1* (1973) 259 Ind. 647, 650, 291 N. E. 2d 355, 356, as follows:

> "Once having determined [the legislative] intent, however, the ambiguity disappears, and we are no more at liberty to adopt a construction that will not give effect to such intent than we would be had there been no ambiguity in the first instance. This, notwithstanding that we may not approve its purpose or that we perceive undesirable side effects apparently not envisioned at the time of passage."

Judgments affirmed.

ROBERTSON, *C. J.*, (participating by designation) and WHITE, J. CONCUR.

IN THE HOWARD SUPERIOR COURT

1976 Term

STATE OF INDIANA
COUNTY OF HOWARD } ss:

THOMAS J. HILLIGOSS and KAY BERRYMAN, ET AL.,

vs.

ARTHUR J. LA DOW, as Mayor of the City of Kokomo, Indiana, ET AL.

Civil Cause No. 18057

GERALD SWING and MARGARET TOMLINSON, ET AL.,

vs.

ARTHUR J. LA DOW, as Mayor of the City of Kokomo, Indiana, ET AL.

Civil Cause No. 18058

OPINION AND JUDGMENT OF THE COURT

These are two class actions brought against the City of Kokomo, Indiana, in which plaintiffs are retired members, or widows and dependents of deceased retired members of the Police and Fire Departments of the City. The two cases were consolidated for trial.

Plaintiffs seek to have the amounts of their pensions increased and rely upon provisions in the statutes creating their pension rights which provide in the case of firemen that the amount of the monthly pension shall be "a sum equal to 50% of the monthly wage received by a fully-paid first-class fireman in such city *at the time of the payment of such pension*———", (emphasis added); and in the case of policemen, a provision in the statute

that "At any time that the salary of a first-grade patrolman is increased or decreased, the pension payable hereunder shall be proportionately increased or decreased." (Lesser percentages are provided for widows and dependents of deceased members.)

Plaintiffs do not claim that their pensions have not been increased proportionately as wages and salaries of active firemen and policemen have been increased, but do claim alternatively that the terms "wages" or "salaries are broad enough to include certain fringe benefits granted to active employees and that a proportionate increase should be granted to pensioners, or that those fringe benefits were granted active employees rather than increasing their salaries or wages, as a subterfuge in order to avoid having to increase the pensions of retired members, as required by state law. The so-called fringe benefits consist of holiday pay, shift premium pay, clothing allowances, and health insurance.

Holiday Pay

First, as to holiday pay, it has been established that for the year 1976 a first-grade patrolman will receive $283.92 as holiday pay and a first-class fireman will receive $445.28 as holiday pay. There is no showing of any rational basis to deny that this holiday pay is a part of their salary or wages, and holiday pay should be included as a part of salary or wages for the purpose of computing the pensions to which plaintiffs are entitled.

The court further finds that a fully-paid first-class fireman in Kokomo, Indiana, has received annual holiday pay, as a part of his compensation, in the following years and amounts:

1971	$148.54
1972	166.15
1973	127.27
1974	252.56
1975	432.85

That the highest paid first-grade patrolman in Kokomo, Indiana, has received annual holiday pay, as a part of his compensation, in the following years and amounts:

1971	$148.54
1972	166.15
1973	172.27
1974	252.56
1975	274.80

Shift Premium Pay

Next, as to shift premium pay—there are Indiana cases cited by plaintiffs holding that the phrase "salary of a first-grade patrolman" used in the police pension statute (I. C. 19-1-24-3) refers to the highest paid first-grade patrolman in the police department in question, upon the theory that pension statutes are enacted to benefit the pensioners and are to be liberally construed in favor of the pensioner. Kilfoil v. Johnson (1963) 135 Ind. App. 14; City of Vincennes v. McCarter (1968) 142 Ind. App. 493; Orban v. Allen (1968) 143 Ind. App. 513.

Those cases concerned longevity pay, where salaries of police and firemen were increased after a certain number of years in the service. In those cases, there was no question that the increased pay was a part of the salary of the patrolman and the monthly wages of the fireman. Longevity pay is not involved in this case. Presumably, the plaintiffs' pensions already are based upon the full salary, including longevity increases, of a patrolman or fireman in the Kokomo Departments.

Just as longevity pay must be included as "salary" or "compensation", so also shift premium pay must be included. One is incentive to or reward for staying on the job. While the other is incentive to or reward for working the more undesirable hours of the day. As between longevity pay and shift premium pay, there is little to recommend or persuade that longevity pay should, but shift premium pay should not be included in the

term "salary" or "monthly wages". It is the law of this state as decided by the cases referred to above that police and firemen's pensions are to be computed from the salary or the compensation of the "highest paid" first-grade patrolman or first-class fireman in the department. Clearly, the highest paid would be the person in the department who is drawing maximum longevity pay and maximum shift premium pay, in addition to the regular or basic salary. Upon the same reasoning as the cases cited above, the court finds that plaintiffs are entitled to have their pension computed on the basis of the salary of the highest paid first-grade patrolman or first-class fireman including shift premium pay, from and after January 1, 1975, and that for the year 1975, the highest paid first-grade patrolman was paid $307.38 in shift premium pay.

Health Insurance Benefits

The health insurance benefits provided by Kokomo to active members of the police and fire departments are not grounded upon state statutes, as pensions for retired or disabled members are. Health insurance benefits are probably founded upon a contract or possibly a city ordinance, which is not in evidence.

The health insurance program is an optional one in which employees may elect to participate or not. Those who elect to participate must contribute to the payment of premiums for the hospital and medical insurance provided for them. Of 107 active policemen, 70 participate and 37 do not. Of 128 firemen, 97 participate and 31 do not.

While payment of a portion of the premium costs for health insurance is a substantial benefit to those employees who do participate, it is of no benefit to those who do not participate. The salary or monthly wage of an employee is not increased. Those who do not participate receive nothing to compensate them in lieu of the benefit to those who do participate. Not every fringe benefit incidental to employment is necessarily salary or wages, even though those benefits may be the subject of collective bargaining between employer and employees.

There are no statutes or decided cases cited by either side bearing on the question whether an employer's contributions to hospital and medical insurance programs for active employees should be considered as additional salary or wages of active employees for the purpose of computing pensions for retired employees where the amount of pension-entitlement is expressed as a percentage of the salary or wages of active employees.

As indicative that the employer's contribution to health insurance for employees should not be considered as salary or wages, the defendant points out that salary and wages are taxable as income. Apparently, the question raised here was confronted by the United States Congress and in 1954 it amended the Internal Revenue Code to provide:

> "Gross income does not include contributions by the employer to accident or health plans for compensation (through insurance or otherwise) to his employees for personal injuries or sickness". 26 U. S. C. A. 106.

Also, the federal Social Security Act, probably the granddaddy of all pension plans, or at least the most comprehensive, at 42 U. S. C. A. 409(9)(b), defines the term wages as not including the amount of any payment made to or on behalf of an employee (including any amount paid by an employer for insurance) on account of medical or hospitalization expenses—.

While these federal enactments are not conclusive definitions of what is or is not included in the term "wages" or "salary", they do tend to illustrate how those terms are defined in legislation which affects every American citizen and which ought to be generally understood.

The firemen's pension law was enacted in 1937. It is common knowledge that employer-financed group health insurance programs have come into vogue since that time. Kokomo's plan was put in effect in 1971. For the court now to hold that the legislature intended in 1937 that premiums paid by the city on health insurance constituted a part of a fireman's wages for

pension purposes strains the imagination too far. For the court to hold that the terms "wages" or "salary" includes employer-paid health insurance for police and firemen pension purposes, whereas, those same terms "wages" and "salary" exclude employer-paid health insurance for Social Security and for internal revenue purposes, is an example of forthright, straight-forward, unambiguous double-talk which courts have been accused of. It is the conclusion of this court that health insurance premiums paid by the City of Kokomo for those police and firemen who elect to participate are not a part of the wages of a first-class fireman or a first-grade patrolman within the meaning of the statutes defining pension rights of firemen and policemen.

So-called Clothing Allowance

What plaintiffs euphemistically call a clothing allowance turns out, upon examining the statute they rely upon to be a provision "for use by the *active members* of such police and fire departments of all *uniforms, clothing, arms and equipment necessary to the performance of their respective duties:*" Kokomo has increased the allowance required by that statute several times so that the allowance now is $500.00 per year, instead of the $200.00 provided by the statute.

It is true as plaintiffs point out the statute (I. C. 19-1-10-1) was amended in 1965 to provide "that a city—may credit such a uniform allowance to each officer as against his purchases during any calendar year and provide for the payment of any cash balance remaining at the end of the calendar year."

Plaintiffs would capitalize this allowance, call it a part of salary or wages and declare a dividend for themselves in the amount of 50 percent of the allowance to be added to their pensions. (In the case of a retired member). But is this allowance salary or wages within the meaning of the pension statutes, or is it even a "clothing allowance" as plaintiffs call it? The court thinks not.

The statute requires the city to provide for use by the *active* members all uniforms, clothing, arms and equipment necessary to the performance of their duties. Thus, it is not simply a clothing allowance. Pensioners have no duties, hence no uniforms, arms, or equipment are necessary to the performance of any duties, and pensioners are not active members of the police and fire departments; the city would have no right to require pensioners to maintain uniforms, clothing, arms, or equipment, nor any interest in doing so, though the statute authorizes the city to require recipients of the allowance to do so.

Furthermore, there is a second section to the statute providing that all uniforms, clothing, arms and equipment provided by the city under the provisions of the statute shall be and remain the property of such city—the city may sell the same—and any such property lost or destroyed through carelessness of an officer, the value of such property shall be deducted from the pay of any such member. This is hardly a grant of additional salary or wages. It is merely what plaintiffs themselves have called it in their briefs, a "fringe benefit". And contrary to what plaintiffs claim, not every fringe benefit is a part of salary or wages.

If it were shown that the City increased the so-called clothing allowances instead of increasing salaries or wages, as a means of avoiding the statutory requirement that pensions be increased proportionately, then a different conclusion would be justified. The testimony shows that the allowance has been sufficient to offset actual expenditures for uniforms by some members or former members and insufficient for others, and on an annual basis, it has been sufficient in some years and insufficient in other years. The court finds that the allowance has been reasonably proportioned to what an active policeman or fireman would be expected to require, and that the allowance has not been used as a subterfuge to increase compensation to active members only in order to deprive pensioners of additional pension benefits.

The court therefore finds that neither the allowance required by I. C. 19-1-10-1, nor the additional allowance provided by

the City of Kokomo are part of the monthly wages of firemen or salaries of policemen within the meaning of the pension statutes, and plaintiffs are not entitled to have said allowance included as a basis for computing the amount of their pensions.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the Board of Trustees of the Police Pension Fund of the City of Kokomo, Indiana, include in the computation of the pension payments hereafter made to plaintiffs Thomas J. Hilligoss and Kay Berryman and the class they represent consisting of all other retired members and widows and dependents of former members of the police department of the city of Kokomo, Indiana, who are entitled to pension payments pursuant to the provisions of I. C. 1971, 19-1-24, the compensation paid to first-grade patrolmen in the form of holiday pay and shift premium pay, and it is further

ORDERED, ADJUDGED AND DECREED that the Board of Trustees of the Firemen's Pension Fund of the City of Kokomo, Indiana, include in the computation of the pension payments hereafter made to plaintiffs Gerald Swing and Margaret Tomlinson and the class they represent consisting of all other retired members and widows and dependents of former members of the fire department of the city of Kokomo, Indiana, who are entitled to pension payments pursuant to the provisions of I. C. 1971, 19-1-37, the compensation paid to first-class firemen in the form of holiday pay, and it is further

ORDERED, ADJUDGED AND DECREED that the said Board of Trustees compute the amount of deficiencies in past pension payments commencing with the year 1971, owing to the plaintiffs in these actions and the classes they represent by reason of the failure of said Boards to include in the computation of pension payments the holiday pay and the 3% shift premium pay received by a first-grade patrolman and to file in these cases on or before the ..... day of ....., 1976, schedules showing the amount of deficiencies to each individual member of each class, together with interest accrued at the rate of 8% per annum, and it is further

ORDERED, ADJUDGED AND DECREED that plaintiffs recover of defendants their costs.

The court retains jurisdiction to allow to plaintiffs' attorneys, pursuant to Trial Rule 23D of the Indiana Rules of Procedure, reasonable attorneys' fees and reasonable expenses incurred from the funds recovered for the benefit of the plaintiff classes herein. As promptly as possible after the filing of the above-described schedules by the Boards of Trustees of the Police and Firemen's Pension Funds, a hearing will be held on the matter of the allowance of attorneys' fees and expenses and an order will thereafter be entered by the court directing the payment of the fees and expenses allowed and the distribution of the balance of the funds recovered for the benefit of the plaintiff classes to the members of such classes entitled thereto.

Dated this 16th day of September, 1976.

/s/ WILLIAM E. LEWIS
William E. Lewis
Judge, Howard Superior Court

APPENDIX B.

OPINION OF ATTORNEY GENERAL

STATE OF INDIANA
Attorney General
Indianapolis
46204

December 14, 1973

Honorable Philip H. Hayes
Indiana State Senator
16 N. W. Sixth Street - No. 200
Evansville, Indiana 47708

Official Opinion No. 35

Dear Senator Hayes:

This is in response to your request for my official opinion regarding the following question:

> "Are clothing allowances and incentive money bonuses for educational achievement by a policeman considered increases in pay for first-class patrolmen for the purpose of computing pension benefits of policemen?"

Analysis

Your attention is directed to the case of *Vincennes* v. *McCarter* (1968), 142 Ind. App. 493, 236 N. E. 2d 76, which interprets I. C. 1971, 19-1-24-3 [Burns' Ind. Stat. Ann. (1973 Supp.), Section 48-6403(3)], and states that police pensions should be:

> ". . . computed on the basis of the highest paid first class patrolman based upon applicable evidence." Id. at 496, 236 N. E. 2d at 78.

This case relied on *Kilfoil* v. *Johnson* (1963), 135 Ind. App. 14, 191 N. E. 2d 321, which dealt with firemen's pensions, and which held:

> ". . . that a fully paid first class fireman is that first class fireman receiving the highest monthly wage or monthly compensation being paid to any first class fireman working in the same Fire Department and City as himself . . . " Id. at 17, 191 N. E. 2d at 323.

Though there is no statutory or case law as to the specific allowances in question, the operative words in the above cases are "wage" and "compensation." Indiana law does not distinguish between the terms "salary," "wages," and "compensation" for purposes of this question. See *Board of School Commissioners* v. *Wasson* (1881), 74 Ind. 133. The 1968 O. A. G. No. 46 provided that salaries of policemen are to be determined by ordinance adopted by the common council, subject to the statutory minimum.

The question, therefore, is whether "bonuses" or clothing allowances are to be considered salary or compensation. I. C. 1971, 19-1-10-1 [Burns' Ind. Stat. Ann. (1973 Supp.), Section 48-6153], requires all municipalities to make clothing allowances to policemen who, after one year of service, are required by such city to furnish and maintain their own uniform clothing, arms, and equipment. Educational bonuses, though not required by statute, would appear to be in the nature of increased compensation for those afficers who have broadened their educational background and are presumed for that reason to be more valuable employees. Black's Law Dictionary, 4th Edition, page 354, defines "compensation" as:

> "[t]he ordinary meaning of the term 'compensation,' as applied to officers, is remuneration, in whatever form it may be given, whether it be salaries and fees, or both combined. . . . It is broad enough to include other remuneration for official services; . . . such as mileage or traveling expenses; and also the repayment of amounts expended. . . ."

From the foregoing, it appears that clothing allowances and "bonuses" for obtaining a college education would be considered as compensation or salary to policemen and, as such, would come within the scope of *McCarter* and *Kilfoil,* the latter by analogy, so that these payments should be considered as contributing to that salary which is received by the highest paid first-class patrolman on a given municipal police department as compensation. This result is consistent with the rule that pension laws should be liberally construed in favor of those intended to be benefited. *Kilfoil, supra,* at 325 and cases cited.

It should be noted that this holding may have federal and state income tax consequences. If the educational bonuses and clothing allowances are in the nature of employer reimbursements for expenses, then they are taxed to the extent such reimbursements exceed the expenses incurred by the policeman. If the educational bonus is in the form of a higher salary paid to a policeman depending on the level of education completed, then such higher salary is taxable to the same extent as any other salary or wage.

Conclusion

It is, therefore, my Official Opinion that clothing allowances and incentive money bonuses for educational achievement by a policeman may be considered as increases in salary to a first-class patrolman for the purpose of computing pension benefits of policemen. But such bonuses and allowances might then be taxable in accordance with federal and state income tax laws.

Yours truly,

/s/ THEODORE L. SENDAK
Theodore L. Sendak
Attorney General of Indiana

TLS:pam

APPENDIX C.

JUDGMENT AND POST-JUDGMENT PETITIONS AND ORDERS

STATE OF INDIANA

Clerk of the Supreme Court and Court of Appeals
Billie R. McCullough, Clerk
217 State House
Indianapolis, 46204
Telephone 633-5200

No. 2-1276A448

Hilligoss v. *LaDow*

You are hereby notified that the Indiana Court of Appeals has on this day issued the enclosed OPINION.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

Witness my name and the seal of said Court this 8th day of November, 1977.

/s/ BILLIE R. MCCULLOUGH
Clerk Supreme Court and Court of Appeals

IN THE
COURT OF APPEALS OF INDIANA
Second District

No. 2-1276A448

THOMAS J. HILLIGOSS and KAY BERRYMAN, on behalf of themselves and all others similarly situated,
Plaintiffs-Appellants,

vs.

ARTHUR J. LADOW, as Mayor of the city of Kokomo, Indiana; et al.,
Defendants-Appellees.

GERALD SWING and MARGARET TOMLINSON, on behalf of themselves and all other similarly situated,
Plaintiffs-Appellants,

vs.

ARTHUR J. LADOW, as Mayor of the city of Kokomo, Indiana; et al.,
Defendants-Appellees.

Filed
Nov. 14, 1977
Billie R. McCullough
Clerk of the
Indiana Supreme and
Court of Appeals

Appeal from the Howard Superior Court, Division No. 1.

The Honorable
William E. Lewis,
Judge.

APPELLANTS' PETITION FOR REHEARING.

Appellants respectfully petition the court to grant a rehearing in the above-entitled cause for the following reasons, to wit:

1. The opinion of this court contravenes a ruling precedent of the Supreme Court in the following cases:

State ex rel. Bolden v. *Johnstone* (1937), 211 Ind. 281, 6 N. E. 2d 706;

State ex rel. Clemens v. *Kern* (1939), 215 Ind. 515, 20 N. E. 2d 514;

Schock v. *Chappell* (1952), 231 Ind. 480, 109 N. E. 2d 423; and
Klamm v. *State ex rel. Carlson* (1955), 235 Ind. 289, 126 N. E. 2d 487;

which hold that "the purpose of the pension act is beneficial and statutes of that character should be liberally construed in favor of those intended to be benefited," whereas the opinion of this court strictly construes the Police Pension Act, IC 19-1-24, and the Fireman's Pension Act, IC 19-1-37, against the appellants who are retired members and widows and dependents of former members of the police and fire departments of the city of Kokomo, Indiana, entitled to pension payments pursuant to the provisions of said statutes.

2. There is a conflict between the opinion of this court in this cause and prior opinions of this court in the following cases:

Kilfoil v. *Johnson* (1963), 135 Ind. App. 14, 191 N. E. 2d 321;
City of Vincennes v. *McCarter* (1968), 142 Ind. App. 493, 236 N. E. 2d 76; and
Orban v. *Allen* (1968), 143 Ind. App. 513, 241 N. E. 2d 378;

which hold that the provisions of the pension statutes governing computation of pension payments "are clear and unambiguous in their context," and that "pensions should [be] computed on the basis of the highest paid first class patrolman [or fireman] based upon applicable evidence," whereas the opinion of this court in this cause holds that the provisions of the pension statutes governing computation of pension payments are unclear and ambiguous, and that compensation to first class patrolmen and first class firemen in the form of fringe benefits should be excluded from the computation of pension payments.

3. The opinion of this court erroneously decides a new question of law by giving effect to Acts 1977, P. L. No. 9 (Sp. Sess.),

§ 15 (IC 19-1-46), although said statute impairs the obligation of appellants' contracts with the city of Kokomo, Indiana, in violation of Article I, Section X, of the Constitution of the United States and deprives appellants of their property without due process of law in violation of Section I of the Fourteenth Amendment to said Constitution.

WHEREFORE, appellants pray that the court rehear this cause.

/s/ DONALD A. SCHABEL
Donald A. Schabel
111 Monument Circle, Suite 1200
Indianapolis, Indiana 46204
317/636-5511

/s/ PAUL I. HILLIS
Paul I. Hillis
3415 South La Fountain Street
Atrium Building, Suite 1
Kokomo, Indiana 46901
317/453-2374
Attorneys for Appellants

CERTIFICATE OF SERVICE.

The Undersigned hereby certifies that he mailed copies of the foregoing petition for rehearing to William P. O'Mahoney, 208 Armstrong Landon Building, Kokomo, Indiana 46901, and to William R. Nolan, 421 West Sycamore Street, Kokomo, Indiana 46901, attorneys for appellees, this 14th day of November, 1977.

/s/ DONALD A. SCHABEL
Donald A. Schabel
Attorneys for Appellants.

STATE OF INDIANA

Clerk of the Supreme Court
and Court of Appeals
Billie R. McCullough, Clerk
217 State House
Indianapolis, 46204
Telephone 633-5200

No. 2-1276 A 448

Thomas J. Hilligoss, et al v. Arthur J. LaDow, et al.

You are hereby notified that the Court of Appeals has on this day Appellants Petition for Rehearing Denied, Robertson, C.J.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court, the 17th day of November, 1977.

/s/ BILLIE R. MCCULLOUGH
Clerk Supreme Court and Court of Appeals

IN THE SUPREME COURT OF INDIANA

No. 2-1276 A 448

THOMAS J. HILLIGOSS and KAY BERRYMAN, on behalf of themselves and all others similarly situated,
Plaintiffs-Appellants,

vs.

ARTHUR J. LADOW, as Mayor of the City of Kokomo, Indiana; ELVA W. LADOW, as Treasurer of Howard County, Indiana; KEITH ANDERSON, as Chief of Police of the City of Kokomo, Indiana; JERRY C. WILSON, HENRY MELTON, LAWRENCE R. DARLIN, ROBERT E. LYTLE, JERRY K. CODY and HAROLD P. BRADEN, as members of the Board of Trustees of the Police Pension Fund of the City of Kokomo, Indiana; ROBERT E. MASSEY, RALPH W. NEAL, DOUGLAS HOGAN, ROBERT M. LOUKS, JAMES T. PAPACEK, JAMES S. SUTTERFIELD, JOHN W. KENNEDY, JAMES MANNION and STEPHEN DAILEY, as members of the Common Council of the City of Kokomo, Indiana,
Defendants-Appellees.

GERALD SWING and MARGARET TOMLINSON, on behalf of themselves and all others similarly situated,
Plaintiffs-Appellants,

vs.

ARTHUR J. LADOW, as Mayor of the City of Kokomo, Indiana; ROBERT E. DONAGHUE, as Chief of the Fire Force of the City of Kokomo, Indiana; WILLIAM D. CARTER, RAYMOND D. JOHNSON, MORRIS J. NICHOLS, ROBERT M. COX and WILLIAM F. HUDELSON, as members of the Board of Trustees of the Firemen's Pension Fund of the City of Kokomo, Indiana; ROBERT E. MASSEY, RALPH W. NEAL, DOUGLAS HOGAN, ROBERT M. LOUKS, JAMES P. PAPACEK, JAMES S. SUTTERFIELD, JOHN W. KENNEDY, JAMES MANNION and STEPHEN DAILEY, as members of the Common Council of the City of Kokomo, Indiana,
Defendants-Appellees.

Filed
November 23, 1977
Billie R. McCullough
Clerk of the
Indiana Supreme and
Court of Appeals

Appeals from the Howard Superior Court, Division No. 1.

The Honorable
William E. Lewis,
Judge.

APPELLANTS' PETITION TO TRANSFER.

Appellants petition the court to transfer the above-entitled cause to the Supreme Court for review, and in support hereof respectfully show to the court:

1. The judgment of the Howard Superior Court, Division No. 1, was affirmed by the Court of Appeals of Indiana, Second District, on November 8, 1977, and the case was decided with a written opinion filed on that date.

2. The opinion of the court of appeals was against the appellants, petitioners herein.

3. Appellants filed their petition for rehearing with the clerk of the court of appeals on November 14, 1977, which date was within twenty days from the rendition of the decision of the court of appeals.

4. Appellants' petition for rehearing was denied by the court of appeals on November 17, 1977. This petition to transfer is filed within twenty days from the day of the ruling on the petition for rehearing.

5. The opinion of the court of appeals contravenes a ruling precedent of the supreme court in the following cases:

State ex rel. Bolden v. *Johnstone* (1937), 211 Ind. 281, 6 N. E. 2d 706;
State ex rel. Clemens v. *Kern* (1939), 215 Ind. 515, 20 N. E. 2d 514;
Schock v. *Chappell* (1952), 231 Ind. 480, 109 N. E. 2d 423; and
Klamm v. *State ex rel. Carlson* (1955), 235 Ind. 289, 126 N. E. 2d 487;

which hold that "the purpose of the pension act is beneficial and statutes of that character should be liberally construed in favor of those intended to be benefited," whereas the opinion of the court of appeals strictly construes the Police Pension Act,

IC 19-1-24, and the Firemen's Pension Act, IC 19-1-37, against the appellants who are retired members and widows and dependents of former members of the police and fire departments of the city of Kokomo, Indiana, entitled to pension payments pursuant to the provisions of said statutes.

6. There is a conflict between the opinion of the court of appeals in this cause and prior opinions of the court of appeals in the following cases:

Kilfoil v. *Johnson* (1963), 135 Ind. App. 14, 191 N. E. 2d 321;
City of Vincennes v. *McCarter* (1968), 142 Ind. App. 493, 236 N. E. 2d 76; and
Orban v. *Allen* (1968), 143 Ind. App. 513, 241 N. E. 2d 378;

which hold that the provisions of the pension statutes governing computation of pension payments "are clear and unambiguous in their context," and that "pensions should [be] computed on the basis of the highest paid first class patrolman [or fireman] based upon applicable evidence," whereas the opinion of the court of appeals in this cause holds that the provisions of the pension statutes governing computation of pension payments are unclear and ambiguous, and that compensation to first class patrolmen and fire class firemen in the form of fringe benefits should be excluded from the computation of pension payments.

7. The opinion of the court of appeals erroneously decides a new question of law by giving effect to Acts 1977, P. L. No. 9 (Sp. Sess.), § 15 (IC 19-1-46), although said statute impairs the obligation of appellants' contracts with the city of Kokomo, Indiana, in violation of Article I, Section X, of the Constitution of the United States and deprives appellants of their property without due process of law in violation of Section I of the Fourteenth Amendment to said Constitution.

WHEREFORE, appellants pray that this cause be transferred to the Supreme Court for review.

/s/ DONALD A. SCHABEL
Donald A. Schabel
111 Monument Circle, Suite 1200
Indianapolis, Indiana 46204
317/636-5511

/s/ PAUL I. HILLIS
Paul I. Hillis
3415 South La Fountain Street
Atrium Building, Suite 1
Kokomo, Indiana 46901
317/453-2374

Attorneys for Appellants

CERTIFICATE OF SERVICE.

The undersigned hereby certifies that he mailed copies of the foregoing petition to transfer and of the supporting brief to William P. O'Mahoney, 208 Armstrong Landon Building, Kokomo, Indiana 46907, and to William R. Nolan, 421 West Sycamore Street, Kokomo, Indiana 46901, attorneys for appellees, this 28th day of November, 1977.

/s/ DONALD A. SCHABEL
Donald A. Schabel

STATE OF INDIANA

Clerk of the Supreme Court
and Court of Appeals
Billie R. McCullough, Clerk
217 State House
Indianapolis, 46204
Telephone 633-5200

No. 2-1276A448

Thomas J. Hilligoss et al. v. Arthur J. LaDow et al.

You are hereby notified that the Supreme Court has on this day Appellants Petition to Transfer is hereby Denied. Givan, C. J. All Justices Concur.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court, this 16th day of February, 1978.

/s/ BILLIE R. MCCULLOUGH
Clerk Supreme Court and Court of Appeals

APPENDIX D.

NOTICE OF APPEAL.

IN THE COURT OF APPEALS OF INDIANA
Second District

No. 2-1276 A 448

THOMAS J. HILLIGOSS and KAY BERRYMAN, on behalf of themselves and all others similarly situated,
Plaintiffs-Appellants,

vs.

ARTHUR J. LADOW, as Mayor of the City of Kokomo, Indiana; ELVA W. LADOW, as Treasurer of Howard County, Indiana; KEITH ANDERSON, as Chief of Police of the City of Kokomo, Indiana; JERRY C. WILSON, HENRY MELTON, LAWRENCE R. DARLIN, ROBERT E. LYTLE, JERRY K. CODY and HAROLD P. BRADEN, as members of the Board of Trustees of the Police Pension Fund of the City of Kokomo, Indiana; ROBERT E. MASSEY, RALPH W. NEAL, DOUGLAS HOGAN, ROBERT M. LOUKS, JAMES T. PAPACEK, JAMES S. SUTTERFIELD, JOHN W. KENNEDY, JAMES MANNION and STEPHEN DAILEY, as members of the Common Council of the City of Kokomo, Indiana,
Defendants-Appellees.

GERALD SWING and MARGARET TOMLINSON, on behalf of themselves and all others similarly situated,
Plaintiffs-Appellants,

vs.

ARTHUR J. LADOW, as Mayor of the City of Kokomo, Indiana; ROBERT E. DONAGHUE, as Chief of the Fire Force of the City of Kokomo, Indiana; WILLIAM D. CARTER, RAYMOND D. JOHNSON, MORRIS J. NICHOLS, ROBERT M. COX and WILLIAM F. HUDELSON, as members of the Board of Trustees of the Firemen's Pension Fund of the City of Kokomo, Indiana; ROBERT E. MASSEY, RALPH W. NEAL, DOUGLAS HOGAN, ROBERT M. LOUKS, JAMES P. PAPACEK, JAMES S. SUTTERFIELD, JOHN W. KENNEDY, JAMES MANNION and STEPHEN DAILEY, as members of the Common Council of the City of Kokomo, Indiana,
Defendants-Appellees.

Filed
February 22, 1978
Billie R. McCullough
Clerk of the
Indiana Supreme and
Court of Appeals

Appeals from the Howard Superior Court, Division No. 1.

The Honorable
William E. Lewis,
Judge.

Notice is hereby given that Thomas J. Hilligoss and Kay Berryman, on behalf of themselves and all others similarly situated, and Gerald Swing and Margaret Tomlinson, on behalf of themselves and all others similarly situated, the above-named appellants, hereby appeal to the Supreme Court of the United States from the final judgment entered on November 8, 1977, by the Court of Appeals of Indiana, Second District, which became the highest court of the State of Indiana in which a decision could be had when the Supreme Court of Indiana denied appellants' petition to transfer on February 16, 1978.

This appeal is taken pursuant to 28 U. S. C. § 1257(2).

/s/ DONALD A. SCHABEL
Donald A. Schabel
111 Monument Circle, Suite 1200
Indianapolis, Indiana 46204
317/636-5511

/s/ PAUL I. HILLIS
Paul I. Hillis
3415 South La Fountain Street
Atrium Building, Suite 1
Kokomo, Indiana 46901
317/453-2374
Attorneys for Appellants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he mailed copies of the foregoing notice of appeal to William P. O'Mahoney, 208 Armstrong Landon Building, Kokomo, Indiana 46901, and to William R. Nolan, 421 West Sycamore Street, Kokomo, Indiana 46901, attorneys for appellees, this 22nd day of February, 1978, and that all parties required to be served have been served.

/s/ DONALD A. SCHABEL
Donald A. Schabel

APPENDIX E.

STATUTES INVOLVED.

Public Law No. 9 (Special Session)

[H. 1344. Approved May 25, 1977.]

An Act to amend IC 6-7-1, IC 7.1-4, IC 18-1-12 and IC 19-1 concerning policemen's and firemen's pensions and funding of these pensions.

Be it enacted by the General Assembly of the State of Indiana:

* * * * *

Section 15. IC 19-1 is amended by adding a New chapter 46 to read as follows:

Chapter 46. Policemen and Firemen Benefit Overpayments.

Sec. 1. The general assembly finds:

(1) That it has never been the intention of the general assembly that remuneration or allowances for fringe benefits, incentive pay, holiday pay, insurance, clothing, automobiles, firearms, education, overtime, or compensatory time off be used in the calculation of benefits under IC 18-1-12, IC 19-1-18, IC 19-1-24, IC 19-1-25-4, or IC 19-1-37; and

(2) That, despite the intention of the general assembly, these benefits for policemen and firemen and their survivors have in some instances been calculated based on this remuneration or these allowances.

Sec. 2. It is not the policy of the general assembly to cause financial hardship to those recipients whose benefits were not properly determined; therefore, the inclusion of remuneration or allowances for fringe benefits, incentive pay, holiday pay, insurance, clothing, automobiles, firearms, education, overtime, or compensatory time off, in the computation of retirement, dis-

ability, or survivor benefits under IC 18-1-12, IC 19-1-18, IC 19-1-24, IC 19-1-25-4, and IC 19-1-37, for recipients who, on or before May 1, 1977, began receiving benefits which were calculated based on such remuneration or allowances, is hereby legalized as to the payment of benefits to these recipients on or before May 1, 1977, and this inclusion is hereby authorized to continue, but only as to these recipients during their eligibility for benefits. No city, town, township, or county, or any official thereof, is liable for making such overpayments and no recipient is required to repay any overpayment.

Section 16. (a) Because an emergency exists for the retroactive taking effect of Sections 1, 2, 7, 15 and 16 of this act, these Sections take effect May 1, 1977.

(b) Because an emergency exists, Sections 3, 4, 5, 6, and 8 of this act take effect July 1, 1977.

(c) Sections 9 through 14 of this act take effect January 1, 1978.

INDIANA CODE

TITLE 19

LOCAL GOVERNMENT SERVICES

Article 1

Public Safety

* * * * *

Chapter 24

Police Pension Funds in All but First-Class Cities

19-1-24-1 [48-6401]. Cities of first class excepted—Creation—Boards of trustees—Appointment—Duties—Vacancies—Powers.—In every city except cities of the first class there shall be and is hereby created a police pension fund.

Such police pension fund shall be governed and managed by a board of trustees, to be composed of not less than seven [7] and not more than nine [9] members, as follows: The mayor, the city treasurer, the chief of police of such city, who shall be ex officio members of the board, one [1] retired member of the police force of such city, and not more than five [5] nor less than three [3] active members of the police force of such city: Provided, That in any city of the fifth class wherein there are not sufficient members of the police department to appoint a board consisting of at least five [5] members, such board of trustees may be composed of three [3] members as follows: the mayor, the city clerk-treasurer and chief of the police department. The retired member and the active members of such police force who are elected to membership on the board shall be elected at a meeting of the members of the police force of such city, to be held at the central police station on the second Monday in February of each year: Provided, That in such cities the board of trustees of such police pension fund now in office shall continue in office for the respective terms for which they were selected,

and thereafter there shall be selected on the second Monday in February of each year, two [2] trustees for a term of three [3] years, to succeed those whose terms of office shall expire on such date, and such trustees shall hold their said offices until their successors shall be elected and qualified.

In the event of a vacancy in the office of any of the trustees selected by such police force, as aforesaid, by death, resignation or otherwise, then such police force shall within a reasonable time thereafter, upon the call of the mayor of such city, hold a special meeting and elect a successor for the remainder of the term of such member. A majority of all such trustees shall constitute a quorum for the transaction of business pertaining to such pension fund. Such trustees shall receive no pay for their services as such, and shall be paid only their necessary expenses: Provided, however, That such trustees, the secretary and each member of such police force so selected by said board of trustees, shall be paid out of such fund their necessary traveling expenses when acting upon matters pertaining to such police pension fund. Such board shall have the power to make all necessary by-laws for meetings of the trustees, the manner of their election, the counting and canvassing of the votes therefor, the collection of all moneys and other property due or belonging to such funds, and all matters connected with the care, preservation and disbursement of the same, as well as all other matters connected with the proper execution of the purposes and provisions of this act [19-1-24-1—19-1-24-4] in relation to such police fund. The mayor shall be president of such board, and the city treasurer shall be its treasurer; and such board shall select one [1] of its members to act as secretary. Such secretary shall be paid out of such fund such sum for his services as may be fixed by the board of trustees. It shall be the duty of the president to preside over all meetings of the board, call special meetings of the police force of such city, and preside over the annual and called meetings of the same held with relation to such fund. Such city treasurer shall have the custody of all moneys, notes, bonds and other securities

due or belonging to such police pension fund, and he shall collect the principal and interest of the same. He shall be liable on his bond, as such city treasurer, for the faithful accounting of all moneys and securities which may come into his hands belonging to such fund. He shall keep a separate account, which shall show at all times the true condition of such fund. Such treasurer shall, upon the expiration of his term of office, account to such board for all moneys, notes, bonds and other securities coming into his hands, and the proceeds of the same, and turn over to his successor all moneys, notes, and other securities belonging to such fund remaining in his hands.

It shall be the duty of the secretary to keep a true account of the proceeding of such board of trustees, and of such police force for such city, when acting upon matters relating to such fund; to keep a correct statement of the accounts of each member with such pension fund, to collect and turn over to the treasurer of such board all moneys belonging to the fund; and he shall render to such board of trustees a monthly account of his acts and services as such, and turn over to his successors all books and papers pertaining to his office. Such secretary shall execute a bond, to be approved by the board of trustees, in such amount as may be fixed by the board, conditioned for the faithful discharge of the duties of his trust. Such secretary and treasurer shall make full, true and accurate reports of their said trusts to the board of trustees on the first Monday in February of each year, copies of which reports shall be filed with the city controller, or city clerk, or clerk-treasurer in cities of the fourth class. The books of the secretary and treasurer shall, at all times, be open to examination by any member of such board of trustees. It shall be the duty of each member of the police force of such city to turn over to the secretary of such board, within thirty [30] days after receiving the same, all moneys and securities which may come into the hands of such member belonging to such fund. [Acts 1925, ch. 51, § 1, p. 167; 1937, ch 107, § 1, p. 496; 1941, ch. 188, § 1, p. 565; 1959, ch. 33, § 1, p. 90.]

19-1-24-2 [48-6402]. Source of funds—Gifts and devises —Fines—Assessments—Tax levy [effective January 2, 1978].— (a) The board of trustees shall have full charge and control of the police pension fund of the city, which shall be derived from the following sources:

(1) Of all moneys that may be given to the board for the use of the police pension fund, by any person or persons. The board of trustees may take by gift, grant, devise, or bequest any money, choses in action, personal property, real estate, or any interest therein. The board shall be authorized to take the gift, grant, devise or bequest under and by the style of the board of trustees of the police pension fund of the city by which the board shall be created and to hold the same, or assign, transfer or sell the same, whenever proper and necessary under and by the name;

(2) Of all moneys, fees and awards of every nature, which may be paid or given to the police force of the city or to any member of the force, by reason of or because of any service or duty performed by the force or members. Also, of all fines imposed by the board of public safety against any member of the force. Also, the proceeds from the sale of all lost, stolen, strayed and confiscated property recovered or taken into possession by members of the police force in the performance of their duties, and sold at public sale in accordance with law;

(3) Every member of the police force who has been accepted and designated as a beneficiary of the police pension by the board of trustees shall be assessed as follows:

(A) On or after January 1, 1978, three ond one-half percent [3½%];

(B) on and after January 1, 1979, four percent [4%];

(C) on and after January 1, 1980, four and one-half percent [4½%];

(D) on and after January 1, 1981, five percent [5%];

(E) on and after January 1, 1982, five and one-half percent [5½%]; and

(F) on and after January 1, 1983, six percent [6%];

of the salary paid a first-class patrolman and which shall be deducted each month from the pay of each member of the police department. The secretary of the board of trustees shall prepare a roll of each of the assessments, and place opposite the name of every member of the police force the amount of the assessment against him; and the treasurer of the board shall deduct and retain out of the salary paid to the officer the amount of the assessment, and place the same to the credit of the police pension fund.

Every person becoming a member of the police force shall from that time be liable to the payment of the assessments, and, in becoming a member of the police force, shall be conclusively deemed to undertake and agree to pay the same and have it deducted from his salary as required in this section.

(b) If in the judgment of the board of trustees of the police pension fund the amount of money which will be available for any year, and from whatsoever source derived, will be insufficient to pay the benefits, pensions and retirement allowances which, by the provisions of this chapter [19-1-24-1—19-1-24-6], the board is obligated to pay, the board shall, at any time prior to the date on which the budget of the city is adopted, prepare an itemized estimate, in such form as shall be prescribed by the state board of accounts, of the amount of money which will be receipted into and disbursed from the police pension fund during the fiscal year next ensuing. The estimated receipts so set forth shall consist of the several items enumerated in subsection (a) of this section. The estimated disbursements as prepared and submitted by the board shall consist of an estimate of the amount of money which will be needed by the board, during the fiscal year next ensuing, to defray the expenses and obligation incurred and which will be incurred by the board in making the payments prescribed in this chapter to retired members, to members who are eligible to and expect to retire during the ensuing fiscal year, and to the dependents of deceased members.

The board is further authorized to provide in its annual budget and to pay out of the funds allocated thereto all necessary expenses of operating the fund, including the payment of all costs of litigation and attorney fees arising in connection with the fund and the payment of benefits and pensions therefrom, and no item of expenditure shall be reduced by the common council, the county board of tax adjustment or by the state board of tax commissioners, any law of this state to the contrary notwithstanding. At the time when the estimates are prepared and submitted, the board shall likewise prepare and submit a certified statement showing the name, age and the date of retirement of each retired member and the monthly and yearly amount of the payment to which the retired member is entitled; the name and age of each member who is eligible to and expects to retire during the fiscal year next ensuing, the date on which the member expects to retire, and the monthly and yearly amount of the payment the member will be entitled to receive; and the name and the age of each dependent, the date on which the dependent became a dependent, the date on which such dependent will cease to be a dependent by reason of his attaining the age at which dependents cease to be dependents, and the monthly and yearly amount of the payment to which the dependent is entitled. The total receipts shall be deducted from the total expenditures as set forth in the itemized estimate and the amount of the excess of the estimated expenditures over the estimated receipts shall be paid by the city, in the same manner as other lawful expenses of the city are paid, and a tax levy shall be made annually for that purpose, as provided in this section. Except as provided in this section, the estimates so submitted shall be prepared and filed in the same manner and form and at the same time that estimates of other city offices and departments are prepared and filed, as provided by law. In the year 1937, and annually thereafter, at the time provided by law, the common council of such city shall levy a tax in such amount and at such rate as will be necessary to produce the revenue to pay that proportion of the

police pensions which the city is obligated to pay. All money derived from the levy is hereby appropriated to the board of trustees of the police pension fund for the exclusive use of the police pensions and benefits. The respective amounts set forth in the estimated disbursements, if found to be correct and in conformity with the data submitted in the certified statement shall be a binding obligation upon the city, and the common council shall make a levy therefor which will yield an amount equal to the estimated disbursements, less the amount of the estimated receipts and neither the county board of tax adjustment nor the state board of tax commissioners shall have any power to reduce the levy so made, any law of this state to the contrary notwithstanding. [Acts 1925, ch. 51, § 2, p. 167; 1937, ch. 107, § 2, p. 496; 1941, ch. 188, § 2, p. 565; 1955, ch. 77, § 1, p. 162; 1973, P. L. 191, § 1, p. 1007; 1977 (Spec. Sess.), P. L. 9, § 11, p. .....]

19-1-24-3 [48-6403]. Investment of funds—Limitations—Use of funds—Benefits.—The board of trustees of such police pension fund shall determine how much of such fund may be safely invested, and how much shall be retained for the needs, demands and exigencies of the fund. Such investment shall be made in interest bearing bonds of the United States or of the state of Indiana, or any bond lawfully issued by any county, township or municipal corporation of this state, or any street, sewer or other improvement bonds of any city or town of this state; and such bonds shall be deposited with and remain in the custody of the treasurer of such board, who shall collect the interest due thereon as the same becomes due and payable. Such fund shall be used and devoted to the following purposes:

(1) To the payment of such temporary benefits as the board of trustees may determine, not less than twenty-five dollars [$25.00] per month and not to exceed seventy-five dollars [$75.00] per month to such members of the active police force who have suffered any physical or mental disability.

(2) To the payment of a pension in such sum, not in excess of fifty per cent [50%] of the salary received by a first-class patrolman, as may be decided by the board of trustees as to any member of such police force who may be retired from active service upon physical examination by the police surgeon or other surgeon to be appointed by said board of trustees, where it is found that such member has suffered or contracted any disease, mental or physical, or any disability which renders such member unfit for active duty on such police force, or for any duty in such police department, such disability to be determined solely by said board of trustees after examination and hearing, and after due notice to such member, as provided in this clause for reinstatement in the service of such police force of any such retired member, and such members shall be retained on active duty with full pay until so retired by said board of trustees because of such disability, as aforesaid: Provided, however, That after any such member shall have been so retired upon pension, the board of trustees shall have the right, at any time, to cause such retired member again to be brought before it and examined by the police surgeon or other surgeon to be appointed by said board of trustees and thereupon to determine whether such disability still exists and whether such retired member shall remain on the pension roll, but such retired member shall be retained on the pension roll until reinstated in the service of the police force, except in case of resignation. If upon such examination and hearing such retired member shall be found to have recovered from his disability and to be again fit for active duty, then such member shall again be put on active duty with full pay and from that time he shall cease to be entitled to any payments out of such pension fund. At such hearing, the board of trustees shall have the right to examine witnesses, and if necessary, to subpoena same, and the retired member shall be entitled to due notice of the time and place of such hearing and to be present at the same and to propound any question pertinent or relevant to the question of his disability and to introduce evidence

upon his own behalf as to such question and for that purpose to subpoena witnesses in the same manner as the board of trustees may subpoena witnesses, as aforesaid. All witnesses so produced shall be examined under oath and any member of such board of trustees is hereby authorized to administer such oath. If, upon such hearing, the board of trustees shall decide that such retired member is then fit for active duty and shall order such member to return to active duty and such member fails or refuses so to do, he shall thereupon and thereby waive any and all right to any further benefits of said fund. At any time that the salary of a first-grade patrolman is increased or decreased, the pension payable hereunder shall be proportionately increased or decreased.

(3) To any member of the police department of such city who retires from active service after twenty [20] or more years of such active service by such member, an annual pension equal to fifty per cent [50%] of the salary of a first-grade patrolman in such police department, plus two per cent [2%] of such first-grade patrolman's salary for each year of service of such retired member over twenty [20] years, provided that such pension shall not exceed in any year an amount greater than seventy-four per cent [74%] of the salary of a first-class patrolman. Such pensions shall be computed on an annual basis but shall be paid in twelve [12] equal monthly instalments. At any time that the salary of a first-grade patrolman is increased or decreased, the pension payable hereunder shall be proportionately increased or decreased.

In case of voluntary retirement, upon application, after twenty [20] or more years of service, such member shall be entitled to such retirement and the pension, hereinabove provided, without reference to his physical condition at the time of application, but he shall thereupon and thereby relinquish all right to any other benefits or pensions as for temporary disability upon being so retired. After such retirement he shall not be required to render further service on such police force, nor shall he be

subject to the rules of the department, nor be deprived of the other benefits by this chapter [19-1-24-1—19-1-24-6] provided, which may thereafter accrue to him or his dependents. To entitle any member to be retired on account of length of service, as aforesaid, only the time served by such member upon the regularly constituted police force of such city shall be computed, and no time served by any member as a special police officer, a merchant policeman or private policeman shall be considered in computing such length of service.

(4) To the payment of funeral benefits to the heirs or estate of any active or retired member of the police force who has suffered death from any cause, an amount fixed by ordinance, but no less than six hundred dollars [$600].

Except as herein otherwise provided, to the payment to the widow of any police officer who may die under the circumstances set out above, an amount fixed by ordinance, but not less than a sum equal to thirty per cent [30%] of the monthly pay of a first-class patrolman per month to continue during her life while unmarried, and the payment to each child of any such deceased police officer under the age of eighteen [18] years, an amount fixed by ordinance but no less than a sum equal to ten per cent [10%] of the monthly pay of a first-class patrolman per month to each of such children, such payments to a minor child or children under the age of eighteen [18] years to continue only so long as such child or children shall remain under the age of eighteen [18] years; Provided, however, That the benefits herein shall in no event exceed the maximum benefits as computed in this law for pension payments to any member of the police department of such city who retires from active service after twenty [20] years or more of such active service. If any police officer shall remarry after his retirement from the police force and shall subsequently die, the woman to whom he is married subsequent to his retirement shall not be deemed to be a widow under the provisions of this chapter, and shall not be entitled

to receive a pension under the provisions of this chapter, unless the woman to whom he is remarried is his former wife.

In the event that any such deceased officer leaves no widow and no child under the age of eighteen [18] years but does leave a dependent father or mother or both father and mother, a sum equal to twenty per cent [20%] of the monthly pay of a first-class patrolman per month from the time of his decease shall be paid to such dependent father or mother or both during their dependency, but in the event both father and mother shall so survive and be dependent, said sum equal to twenty per cent [20%] of the monthly pay of a first-class patrolman shall be paid to them jointly and not to each. In each of the causes above provided for payment to a dependent relative of a deceased officer, the board of trustees of the police pension fund shall be the final judges of the question of necessity and dependency and of the amount within the limits above stated to be paid in any such case. Said board of trustees shall also have the power to reduce or terminate temporarily or permanently any such payment to any dependent relative of a deceased officer, when in its judgment the condition of the pension fund or any other circumstances may warrant or render necessary.

At any time that the salary of a first-grade patrolman is increased or decreased, the pension payable hereunder shall be proportionately increased or decreased.

(5) To the payment of an amount equal to the pensions provided by law in case of voluntary retirement after twenty [20] years' service to any member of such police force who may be dismissed therefrom for any reason, after having been in actual service for twenty [20] years, and to the payment of two per cent [2%] per month additional for each full year of service in excess of such twenty [20] years' service to any member of such police force who may be dismissed therefrom after having been in active service on such police force for more than twenty [20] years; Provided, however, That no pension provided for in this

subsection shall be based or paid upon any service in excess of thirty-two [32] years in any such department. [Acts 1925, ch. 51, § 3, p. 167; 1927, ch. 84, § 1, p. 214; 1931, ch. 58, § 1, p. 139; 1937, ch. 107, § 3, p. 496; 1941, ch. 188, § 3, p. 568; 1955, ch. 77, § 2, p. 162; 1971, P. L. 284, § 1, p. 1136; 1972, P. L. 146, § 1, p. 732; 1973, P. L. 192, § 1, p. 1011.]

19-1-24-4 [48-6404]. Retired members — Examination — Exemption from attachment.—Any member of such police force placed on the retired list, except such as have served on such force for twenty [20] years or more and have been retired for that reason, shall report for duty to the chief of police or marshal, from time to time, as may be provided for in the by-laws of the board, and shall be subject to the orders and discipline of such chief or marshal, and shall perform such duties as may be required of him, and for which, in the opinion of the police surgeon he may be fit, and for which he shall be allowed full pay; and for any refusal to obey such orders and for a breach of such discipline, the said chief shall report such member at once to the board of public safety for such action as by it may be deemed proper for the good of the service; and member[s] shall be subject to punishment and dismissal in the same manner as officers in active service. Any pension such retired member may have received shall cease in case of his expulsion; and such pension, for any refusal to obey orders or other breach of discipline, as aforesaid, shall be subject to whatever orders may be deemed proper by the board of public safety. It shall be the duty of the police surgeon of such city to make all examinations of the members of the police force of such city whenever requested by the board of trustees of the police pension fund, or whenever any such member requests him to do so for the purpose of certifying to his physical or mental condition to such board, or whenever he deems it proper to do so; and he shall thereupon certify to such board the true physical or mental condition of such person. If, at any time, there should not be sufficient money to the credit of such police pension fund to pay all claims

against it in full, claims on account of the death of members of such force, if there be any such, shall be first paid in full with as little delay as possible, after which an equal percentage shall be paid upon all other claims to the full extent of the funds on hand, until such funds be replenished so as to pay them in full. All pensions herein provided for shall be paid by the treasurer of such board at his office at the same time and in such instalments as the members of the police force of such city are paid. All pensions granted and payable out of such police pension fund shall be exempt from seizure or levy upon attachment, execution, supplemental process, and all other process, whether mesne or final, and shall not be subject to sale, assignment or transfer by any beneficiary: Provided, further, however, That in no event shall a pension be paid to an employee of the police department who at the time of his appointment was over thirty-five [35] years of age, or who failed at that time to pass the medical examination required and provided by the board of trustees of the police pension fund, and power is hereby given to said board to require and provide for a medical examination for employees of the police department, with power to accept or reject them as members of the pension fund: Provided, however, any such person over the age of thirty-five [35] years, or who has failed to pass the medical examination required, shall be exempt from paying or contributing any money to the police pension fund: Provided, however, That this provision is in no way to apply to the present members of the pension fund, or to those who have resigned, been removed or suspended, and have been reinstated by the board: Provided, further, That all employees of the police department at the time any city may have heretofore established or may hereafter establish, a police pension fund, shall, regardless of their age at the time they became members of the department, become members of such fund and be entitled to all the benefits thereof and shall pay the assessments therein provided and be subject to all the other provisions of said act [19-1-24-1—19-1-24-6] and all amendments thereof. [Acts 1925, ch. 51, § 4, p. 167.]

19-1-24-5 [48-6405]. Forfeiture of pension.—Whenever any person who shall have received any benefit from such fund shall be convicted of a felony or shall become an habitual drunkard or shall fail to report himself for duty or for examination, or otherwise shall fail to comply with any legal requirements imposed by the board of trustees of the police pension fund, said board may upon notice to any such person discontinue or reduce in its discretion any payments that might otherwise accrue thereafter: Provided, however, That nothing contained in this act [19-1-24-1—19-1-24-6] shall be construed to entitle said board to recall into service any member who has previously been retired from active service on account of having served twenty [20] years or more; nor shall anything in this act be construed to entitle a retired member to a pension after he shall have been convicted of a felony, or shall have become an habitual drunkard. [Acts 1925, ch. 51, § 5, p. 167.]

19-1-24-6 [48-6406]. Amount of benefits paid.—Provided, however, That in all cities of the first, second and third classes heretofore maintaining and operating a police pension fund where there is now being paid a less sum to the beneficiary under the provisions of former acts of the legislature governing such pension fund, that the provisions of this act [19-1-24-1—19-1-24-6] shall not operate to increase such amounts and that this act shall apply only to those retiring or qualifying under the provisions of this act, after the passage of this act [March 4, 1925], except that this proviso shall not apply to cities of the first class. [Acts 1925, ch. 51, § 6, p. 167.]

* * * * *

CHAPTER 37

Firemens Pension Fund

19-1-37-1 [48-6518]. Cities of 114,500 or more—Optional provisions for smaller cities—Pension fund and board of trustees created—Application of act.—A firemen's pension fund and a board of trustees of the firemen's pension fund are hereby created in every city in this state having a population of 114,500 or more according to the last preceding United States census and which maintains a regularly organized and paid fire department. The provisions of this act [19-1-37-1—19-1-37-28] in relation to such fund shall likewise apply to all cities, towns, townships and counties having a population of less than 114,500 which maintains a regularly organized and paid fire department, in case such city, town, township or county shall establish such board of trustees and firemens pension fund, the provisions of this act in relation to such fund and such board of trustees shall apply to and govern such city, town, township or county. [Acts 1937, ch. 31, § 1, p. 156; 1967, ch. 208, § 1, p. 444.]

19-1-37-2 [48-6519]. Board of trustees — Members — Terms—Powers—Duties.—The board of trustees of the firemen's pension fund of every such city, town, township or county shall be composed of seven [7] members, two [2] of whom shall be the chief executive authority and the chief of the fire force, who shall, by virtue of their respective offices be members of such board. The membership shall continue while in office, and in case of their death, resignation or removal, or on the expiration of their respective terms, their successors shall be ex officio members of such board. The other members shall be one [1] retired member of the fire department of such city, town, township or county and four [4] active members of the fire department elected for the terms and in the manner hereinafter provided: Provided, however, That in cities, towns, townships and counties having less than five [5] members in their fire department, or fire force, the city, town, township or county upon adopting the provisions of this act [19-1-37—19-1-37-28] may provide for the organization of a firemen's pension board consisting of the chief of the fire department or fire force, chief executive, and one [1] member of the fire department or fire force. The member to be elected from the fire deparment or fire force shall be elected at a meeting to be held on the second Monday in February, of each year, to be called by the chief of the fire department or fire force, and to be held at the house or quarters of the fire department. The term of the elected member shall be for one [1] year beginning immediately after his election. Every member of such fire department or fire force shall be entitled to one [1] ballot and the person receiving the highest number of votes shall be elected. The chief executive authority, the chief of the fire department or fire force, and the city or county clerk shall canvass and count such ballots and the clerk shall issue a certificate of election to the person having received the highest number of votes. In case any two [2] persons shall have received the same number of votes, then the chief executive authority and the chief of the fire department or fire force shall forthwith by lot determine from the persons so receiving such equal number of votes who shall be trustee.

The board of trustees shall have the management and control of the firemen's pension fund of such city, town, township or county and, of all matters lawfully connected therewith and shall manage, use and disburse such fund for the purpose and in the manner hereinafter prescribed. The board is hereby authorized to adopt and enforce such by-laws, not in conflict with any of the provisions of this act, as may be deemed necessary to enable it effectively and properly to carry into execution the purpose for which it was organized. Each member of such board of trustees shall, before entering upon the duties of his office, take an oath faithfully to perform the duties thereof. The board of trustees shall be a body having a continuous succession. [Acts 1937, ch. 31, § 2, p. 156; 1945, ch. 79, § 1, p. 172; 1967, ch. 208, § 2, p. 444.]

19-1-37-3 [48-6520]. Fire company defined.—Each organization or group doing duty as part of the fire force, whether in fire companies, in telephone or signal service or as inspectors, machanics [mechanics] or watch-service, shall be deemed to be a fire company within the meaning of this chapter [19-1-31-1—19-1-37-28]. Whenever the term "fire company" or "fire companies" is used in this chapter, it shall mean and include such organizations as those hereinbefore designated, as well as companies having charge of fire fighting apparatus for service at fires. [Acts 1937, ch. 31, § 3, p. 156; 1975, P.L. 200, § 8, p. 1097.]

19-1-37-4 [48-6521]. Board of trustees—Election of members—Terms—Procedure.—The first election of members of the board of trustees under the provisions of this act [19-1-37-1—19-1-37-28] shall be held on the second Monday in February, 1938, and an election shall be held on the second Monday in February, 1939, and annually thereafter. At each election so held, one [1] member of the board of trustees shall be elected for a term of four [4] years, commencing on the day of his election. The chief of the fire force shall fix a time for holding a convention to nominate candidates for trustees to be elected at each such election. Each such convention shall be held at least five [5] days before the day on which the annual election is held. Every such convention shall consist of one [1] delegate from each fire company and one [1] delegate to be selected by the chief of the fire force, and his assistant, or if there be more than one [1] assistant, then by such chief and his assistants, acting jointly. The delegate from each fire company shall be elected by ballot by the members of such company at a time to be fixed by the chief of the fire force in the call for such convention. The election of such delegates shall be certified by the captain or other officer of such fire company, or, if there be no such officer present, then by the oldest member thereof present. Such convention, when assembled, shall nominate six [6] members of the fire force to be voted for as such trustees, and the

names of the persons so nominated as candidates shall be the delegates to such convention and shall be reported in writing to their respective companies. [Acts 1937, ch. 31, § 4, p. 156.]

19-1-37-5 [48-6521a]. Election of retired members of the board of trustees—Procedure.—The first election of retired member of the board of trustees under the provisions of this act [19-1-37-1—19-1-37-28] shall be held on the second Monday in February, 1968, and an election shall be held on the second Monday in February, 1970, and biannually [biennially] thereafter. At each election so held, one [1] retired member of the board of trustees shall be elected for a term of two [2] years commencing on the day of his election provided, that the retired list shall contain three [3] or more retired firemen at the time of election. The chief of the fire force shall fix a time for holding a convention to nominate candidates for trustee to be elected at each election. Each such convention shall be held at least fifteen [15] days before the day on which the biannual [biennial] election is held. All retired firemen of the fire department or fire force shall be allowed to participate in the convention. Such convention, when assembled, shall nominate not more than four [4] members of the retired list to be voted for as such trustee and the names of the persons so nominated along with an official ballot shall be mailed to the retired firemen by the secretary of the firemen's pension fund within forty-eight [48] hours of the termination of said convention. [Acts 1937, ch. 31, § 4a, as added by Acts 1967, ch. 208, § 3, p. 444.]

19-1-37-6 [48-6522]. Elections—Time and place—Procedure.—Every such election shall be held at the houses or quarters of the respective companies on the second Monday in February, between the hours of 9 o'clock A. M. and 6 o'clock P. M. Every member of such fire company shall be entitled to one [1] ballot, and no ballot shall contain the names of more than one [1] person, and the person whose name is placed on such ballots shall be chosen from the six [6] persons nominated by the

convention. The candidate receiving the highest number of votes shall be elected. [Acts 1937, ch. 31, § 5, p. 156.]

19-1-37-7 [48-6522a]. Election of retired members by mail—Conditions.—Every such election for the retired member shall be conducted by mail. Every retired member shall be entitled to cast one [1] ballot by mail and the ballot shall contain not more than one [1] name chosen from the list of retired persons nominated by the convention. The candidate receiving the highest number of votes by 6 o'clock P. M., on the second Monday in February, shall be elected. [Acts 1937, ch. 31, § 5a, as added by Acts 1967, ch. 208, § 4, p. 444.]

19-1-37-8 [48-6523]. Canvassing and counting ballots—Procedures.—The captain or other officer in command of each of such fire companies, on the day of and immediately after the casting of such ballots, shall canvass and count such ballots, and shall certify in writing the total number of ballots cast and the number of votes received by each candidate for the office of trustee. After signing such certificate, such officer shall inclose the same, together with all the ballots cast by such fire company, in an envelope, securely sealed and addressed, and deliver such certificate and ballots to the chief of the fire force of such city, who shall deliver the same to the mayor of such city as soon as all such certificates and ballots have been received by him. Upon the receipt thereof, the mayor shall, in the presence of such chief of the fire force and the city clerk, open such envelopes, examining such certificates, and ascertain and determine the total number of the votes so cast at such election for each of such candidates for the office of trustee, and shall issue a certificate of election to the candidate having received the highest number of votes. In case any two [2] or more candidates shall have received the same number of votes, so that there would be no choice under the foregoing provision, then such mayor and the chief of the fire force shall forthwith by lot determine from the persons so receiving such equal number of votes who shall

be trustee. No election shall be set aside for want of formality in balloting by such members, or certifying or transmitting returns of any such election by the officers in charge. [Acts 1937, ch. 31, § 6, p. 156.]

19-1-37-9 [48-6523a]. Counting ballots for election of retired trustee—Procedure.—The ballots for the selection of the retired trustee shall remain closed and inviolate until the close of the election at which time, in the presence of the chief executive authority, the fire chief and the clerk, the ballots shall be opened and counted and a certificate of election issued to the candidate having the highest number of votes. Should two [2] or more candidates receive the same number of votes, the trustees shall be determined in the same manner as provided for in the election of trustees from among the ranks of the active firemen. [Acts 1937, ch. 31, § 6a, as added by Acts 1967, ch. 208, § 5, p. 444.]

19-1-37-10 [48-6524]. President of board—Secretary—Election—Term—Duties.—The chief of the fire force shall be the president of the board of trustees of the firemen's pension fund. At the first meeting after each election, such board of trustees shall elect a secretary, who may be chosen from one of its own number, or, if the board deem proper, a secretary, who shall be a member of the fire department, may be elected by the companies to serve for a term of four [4] years, and the election shall be conducted in the same manner as the election for trustees. It shall be the duty of the secretary to keep a full record of all the proceedings of the board of trustees in a book provided for that purpose. The board shall make all needful rules and regulations for its government in the discharge of its duties, and shall hear and determine all applications for relief or pensions under the provisions of this act [19-1-37-28]. [Acts 1937, ch. 31, § 7, p. 156.]

19-1-37-11 [48-6525]. Source of funds—Gifts and devises—Proceeds of investments—Assessments [effective January 1, 1978].—The firemen's pension fund of each city shall consist of:

(a) All moneys that may be given to the board or fund by any person or persons for the uses and purposes for which the fund is created. The board of trustees may take by gift, grant, devise or bequest any money, personal property, real estate, or interest therein, or any right of property; and gift, grant, devise, or bequest may be absolute or in fee simple, or upon condition that only the rents, income or profits arising therefrom shall be applied to the purposes for which the fund is established.

(b) All moneys, fees, rewards or emoluments of every nature and description that may be paid, given, devised or bequeathed to the fire force or any of the fire companies.

(c) All money accruing as interest on any securities or investments which are owned by and held in the name of the board.

(d) All money received by the board from the sale or by the maturity of any of the securities or investments owned by the board.

(e) Every member of the force shall be assessed a part of his salary as follows:

(A) On and after January 1, 1978, three and one-half percent [3½%];

(B) On and after January 1, 1979; four percent [4%];

(C) On and after January 1, 1980, four and one-half percent [4½%];

(D) On and after January 1, 1981, five percent [5%];

(E) On and after January 1, 1982, five and one-half percent [5½%]; and

(F) On and after January 1, 1983, six percent [6%];

of the salary of a fully paid first class fireman. The secretary of the fire force, or the person whose duty it is to make out the payrolls, shall place opposite the name of every member of the force on the payroll, the amount of assessment on each individual's salary, and the city controller, or other fiduciary officer, shall monthly deduct from the salary of every member of the

force the sum set opposite his name, and shall place the same to the credit of the firemen's pension fund. Every person who becomes a member of the fire force shall be liable to the assessment, and, in becoming a member thereof, shall be conclusively deemed to undertake and agree to pay the same and to have it deducted from his compensation as provided in this section.

(f) Such appropriations as shall be made to or for the benefit of the fund by the common council. [Acts 1937, ch. 31, § 8, p. 156; 1977 (Spec. Sess.), P. L. 9, § 13, p. .....]

19-1-37-12 [48-6526]. Funds—How used—Treasurer—Duties—Bond of president—Reports—Investments.—(a) The firemen's pension fund of each city and town and the appropriations made to or for the benefit of such fund shall be used exclusively for payments to retired members and the dependents of deceased members, for death benefits and for such other incidental expenses as are authorized by and are essential to the proper administration of this act [19-1-37-1—19-1-37-28].

The board of trustees of each firemen's pension fund shall determine how much of the fund may be safely invested, and how much shall be retained for the needs, demands, exigencies of the fund. Such investments shall be made in interest bearing direct obligations of the United States or of the state of Indiana, or any bond lawfully issued by any county, township, or municipal corporation of this state, and such securities shall be deposited with and remain in the custody of the treasurer of such board who shall collect the interest thereon as it becomes due and payable.

(b) Additionally, said pension board may invest the pension fund moneys in savings deposits or in certificates of deposit in any duly chartered national, state, or mutual bank whose deposits are insured by any federal agency; Provided, however, That no deposits shall be made in excess of the amount of insurance protection afforded a member or investor of any such institution.

(c) Additionally, said pension board may invest the pension fund moneys in shares of any federal savings and loan association organized under an act of congress known as the Home Owners' Loan Act of 1933, and amendment thereto, having its principal office in the state of Indiana, or of any building and loan association or savings and loan association organized and operating under the laws of the state of Indiana whose accounts are insured by any federal agency; Provided, however, That no shares shall be purchased in excess of the amount of insurance protection afforded a member or investor of any such institution.

(d) All such securities shall be kept on deposit with the city treasurer, or county treasurer acting as such, who shall collect all interest due thereon and place the same to the credit of such pension fund.

(e) The treasurer shall keep a separate account of such fund, and therein fully and accurately set forth a statement of all money received and paid out by him, and he shall, on the first Monday of January and June of each year, make a report to the board of trustees of the firemen's pension fund of all moneys received and distributed by him. The president of the board shall execute his bond in such sum as the board may deem adequate, conditioned that he will faithfully discharge the duties of his office, and faithfully account for and pay over to the persons authorized to receive the same, all moneys which may come into his hands by virtue of his office, with sureties to the approval of such board of trustees, which bond shall be filed with the mayor. The board of trustees shall make a full and accurate report of the condition of such pension fund to the city controller of such city on the first Monday of February in each year.

(f) All securities which are owned by and held in the name of the board of trustees of the firemen's pension fund at the time of the taking effect of this act [June 8, 1937] shall be held and kept for the board by the city treasurer, or the county treasurer acting as such, until they mature and are retired, except that when any issue of any such securities is refunded, the board shall

accept refunding securities in exchange for and in an amount equal to the securities so refunded. All money received by the board for the surrender of any such matured and retired securities shall be paid into and shall constitute a part of the firemen's pension fund of such city, as provided in section 8 [19-1-37-11] of this act. [Acts 1937, ch. 31, § 9, p. 156; 1969, ch. 120, § 1, p. 266.]

19-1-37-13 [48-6527]. Retirement of physically or mentally disabled member—Payment of pension.—(a) If any member of the fire force of any such city, town, township or county becomes 65 years of age or is found, upon examination, by a medical officer, to be physically or mentally disabled, so as to render necessary his retirement from all service on the force, the chief of the fire force shall retire such person, and the board of trustees shall authorize the payment to such person, monthly from the pension fund the same as prescribed in section 11 [fourteen] [19-1-37-14], of this chapter. All physical and mental examinations of members of the fire force as herein provided shall be made on order of the chief of the fire force by a medical officer designated by the board of trustees of the firemen's pension fund.

(b) When any member of such fire force, or retired member on the pension fund thereof, dies, from any cause whatsoever, and leaves a widow, or a child or children under eighteen [18] years of age, or a child or children over the age of eighteen [18] years who are mentally or physically incapacitated, the board of trustees shall authorize the payment to such widow, while unmarried, and to any child or children under eighteen [18] years of age, or to any child or children over the age of eighteen [18] years who are mentally or physically incapacited [incapacitated], monthly, from the pension fund, the sum or sums prescribed in section 11 [fourteen] [19-1-37-14] of this chapter. If the widow of any deceased member shall remarry, her pension shall cease. If the pension of the widow of a deceased member shall have ceased by virtue of her remarriage, and if the person

to whom she was remarried was a retired member of the fire force who was himself entitled to a pension, then upon the decease of the member to whom she was so remarried, she shall be entitled to receive her pension as the widow of a deceased member as though she had not been remarried. The board of trustees of the firemen's pension fund is hereby authorized to require and provide for a medical examination of applicants for employment in the fire department, as provided in section 15 [eighteen] [19-1-37-18] of this chapter.

(c) If any deceased member of the fire force leaves no widow or children but leaves a dependent mother or father, upon satisfactory proof that such mother or father was wholly dependent upon such deceased member of the fire force, the board of trustees shall authorize the payment to such mother or father, monthly, from the pension fund the sum prescribed in section 11 [fourteen] [19-1-37-14] of this chapter. [Acts 1937, ch. 31, § 10, p. 156; 1967, ch. 208, § 6, p. 444; 1975, P. L. 175, § 2, p. 965.]

19-1-37-14 [48-6528]. Payment of pensions—Amount to be paid—Voluntary retirement—Discharged member.—(a) The sum which shall be paid to permanently disabled members and to the widows, orphans, mothers and fathers of deceased members, shall be as follows: Upon retirement with such disability during service, a member shall receive in monthly instalments an amount equal to fifty-five per cent [55%] of the monthly wage received by a fully paid first class fireman in such city at the time of the payment of such pension; and in the event of his decease while in such service of the fire force or after such retirement, the widow shall receive an amount fixed by ordinance but not less than thirty per cent [30%] of the monthly wage received by a fully paid first class fireman in such city at the time of the payment of such pension; and their children under eighteen [18] years of age each shall receive an amount fixed by ordinance but not less than ten per cent [10%] of the monthly wage received by a fully paid first class fireman in such city at the time of the payment of such pension, and any mother

or father of a deceased member of the fire force who is eligible for a pension, shall receive jointly an amount equal to thirty per cent [30%] of the monthly wage received by a fully paid first class fireman in such city at the time of the payment of such pension. If the board, in its discretion, shall find, upon the submission of satisfactory proof, that any child or children over the age of eighteen [18] years of age are mentally or physically incapacitated, and are not wards of the state, such child or children shall be entitled to receive the same amount as is paid to the widow of a deceased fireman, so long as such mental or physical incapacity shall continue. Any sum so paid for the benefit of such child or children shall be paid to the mother, if alive, so long as such child or children shall reside with and be supported by her, and, in the event of her death, such sum shall be paid to the lawful guardian of such child or children.

(b) Any member of any such paid fire force who has been in such service twenty [20] years, upon making written application to the chief of such fire force, may, at his own option, without medical examination or disability, be retired from all service on such fire force, and on such retirement, the board of trustees shall authorize the payment to such retired member of a sum equal to fifty per cent [50%] of the monthly wage received by a fully paid first class fireman in such city, town, township or county at the time of the payment of such pension plus two per cent [2%] of such fully paid first class fireman's salary for each year of service of such retired member over twenty [20] years: Provided, That such pension shall not exceed in any year an amount greater than seventy-four per cent [74%] of the salary of a fully paid first class fireman. The pension of the dependents of such retired members shall be the same in case of death after the retirement as is provided for dependents of those who die in the service, or after retirement with disability.

(c) Any member who may be discharged from the fire force after having served not less than twenty [20] years shall receive an amount equal to that as if he retired at his own volition. In

the event of the death of any such member after retirement, if he leaves a widow or dependent child or children, they shall receive the amount provided for the dependents of those who have died in the service of the fire force.

(d) All pensions in any class shall be considered to be on an equal basis. In no case shall the board of trustees depart from the provisions of this chapter [19-1-37-1—19-1-37-28] in authorizing the payment of such pensions. [Acts 1937, ch. 31, § 11, p. 156; 1967, ch. 208, §§ 7, 8, p. 444; 1971, P. L. 286, § 1, p. 1152; 1975, P. L. 175, § 3, p. 965.]

19-1-37-15 [48-6529].—Death benefits—Amount—Payable to whom.—In addition to the sums paid as benefits to any permanently disabled, retired or discharged member of the fire force or his dependents, as hereinbefore provided, the board of trustees of the firemen's pension fund shall authorize and pay out of the firemen's pension fund, as death benefits, upon the death of any such disabled, retired or discharged member, who, was receiving or entitled to receive a pension at the time of his death, or upon the death of any member of the fire force who was in active service at the time of his death, the minimum sum of not less than six hundred dollars [$600], which amounts so authorized shall be paid to the legal representative of the deceased member. [Acts 1937, ch. 31, § 12, p. 156; 1967, ch. 208, § 9, p. 444.]

19-1-37-16 [48-6530]. Annual meeting of board of trustees—Reports—Contents—Common council—Appropriations—Effective date of subsection A.—(a) It shall be the duty of the board of trustees of the firemen's pension fund of every such city to meet annually and prepare an itemized estimate, in such form as shall be prescribed by the state board of accounts, of the amount of money which will be receipted into and disbursed from the firemen's pension fund during the fiscal year next ensuing. The estimated receipts so set forth shall consist of the several items enumerated in subsections (a) to (e) inclusive,

of section 8 [19-1-37-11] of this act. The estimated disbursements as prepared and submitted by the board shall be divided into two parts, which shall be designated as part 1 and part 2. Part 1 of such estimated disbursements shall consist of an estimate of the amount of money which will be needed by the board, during the fiscal year next ensuing, to defray the expenses and obligations incurred and which will be incurred by the board in making the payments prescribed in this act [19-1-37-1—19-1-37-28] to retired members, to members who are eligible to and expect to retire during the ensuing fiscal year, and to the dependents of deceased members. Part 2 of such estimated disbursements shall consist of an estimate of the amount of money which will be needed to pay death benefits and such other expenditures as are authorized or required by any of the provisions of this act. At the time when the estimates are prepared and submitted, the board shall likewise prepare and submit a certified statement showing the name, age and the date of retirement of each retired member and the monthly and yearly amount of the payment to which such retired member is entitled; the name and the age of each member who is eligible to and expects to retire during the fiscal year next ensuing, the date on which such member expects to retire, and the monthly and yearly amount of the payment which such member will be entitled to receive; and the name and the age of each dependent, the date on which such dependent became a dependent, the date on which such dependent will cease to be a dependent by reason of his attaining the age at which dependents cease to be dependents, and the monthly and yearly amount of the payment to which such dependent is entitled. The total receipts shall be deducted from the total expenditures as set forth in such itemized estimate and the amount of the excess of the estimated expenditures over the estimated receipts shall be paid by such city, in the same manner as other lawful expenses of such city are paid, and an appropriation shall be made annually for that purpose, as hereinafter provided. Except as herein otherwise provided,

the estimates so submitted shall be prepared and filed in the same manner and form and at the same time that the estimates of other city officers and departments are prepared and filed, as provided by law, and shall be incorporated in and made a part of the annual budget of such city, and neither the mayor nor the controller nor any other fiduciary officer, in revising any of such estimates, shall have any authority to reduce any of the items set forth in part 1 of such estimated disbursements. In 1937, and annually thereafter, at the time provided by law, the common council of such city shall make such appropriations as will be necessary to pay that proportion of the budget of the firemen's pension fund which the city is obligated to pay, as hereinbefore provided. All appropriations so made shall be made to the board of trustees of the firemen's pension fund for the exclusive use of the firemen's pension fund. The respective amounts set forth in part 1 of such estimated disbursements, if found to be correct, and in conformity with the data submitted in the certified statement hereinbefore provided for, shall be a binding obligation upon such ctiy, and the common council shall make an appropriation therefor which shall be in an amount equal to such estimated disbursements, less the amount of the estimated receipts, and neither the county board of tax adjustment nor the state board of tax commissioners shall have any power to reduce the appropriations so made, any law of this state to the contrary notwithstanding. Whereas an emergency exists for the more immediate taking effect of this subsection, this subsection shall take effect on the first day of June, 1937.

(b) If the appropriations for any or all of the purposes contemplated in subsection (a) of this section shall be exhausted prior to the close of the fiscal year for which such appropriations have been made, then and in that event an emergency shall be deemed to exist as contemplated in chapter 150 of the Acts of the General Assembly of 1935 [6-1-41-11], and the common council shall, in the manner provided by chapter 150 of the Acts of the General Assembly of 1935, make such additional appropriations

as may be necessary. If the amount of money in the general fund not otherwise appropriated is less than the additional appropriations found to be necessary, the common council shall borrow the necessary money, in the manner prescribed by law for making loans by the city, and a sufficient tax shall be levied for the ensuing year to repay such loan and the interest which shall have accrued thereon. [Acts 1937, ch. 31, § 13, p. 156.]

19-1-37-17 [48-6531]. Members retired for disability—Rights of board in such cases.—After any member of such fire force shall have been retired upon pension by reason of disability, the board of trustees shall have the right, at any time, to cause such retired member again to be brought before it, and again be examined by competent physicians or surgeons, and shall also have the right to examine other witnesses for the purpose of discovering whether such disability yet continues, and whether such retired member should be continued on the pension roll; but he shall remain upon the pension roll until placed back in active service of the fire department, except in cases of dismissal or resignation. Such retired member shall be entitled to notice and to be present at the hearing of any such evidence, shall be permitted to propound any question pertinent or relevant to such matter, and shall also have the right to introduce evidence on his own behalf. All witnesses so produced shall be examined under oath, and any member of such board of trustees is hereby authorized to administer such oaths to such witnesses. The decision of such board shall be final, and no appeal shall be allowed therefrom, nor shall the same be reviewable by any court or other authority. If any such retired member is found, upon examination, to be physically able to be placed back in active service of the fire department, the board of trustees shall certify the name of such person, and the fact that he has been found physically able to be placed back in active service, to the board of safety, or other appointing authority, and such person shall be placed back in active service, by the appointing authority, as soon as the first vacancy in the fire force occurs thereafter. [Acts 1937, ch. 31, § 14, p. 156.]

19-1-37-18 [48-6532]. Qualifications of members—Effective date of section.—No person who is over the age of thirty-five [35] years or who fails to pass the physical examination required by the board of trustees shall be appointed, reappointed or reinstated as a member of the fire force of any city contemplated in this act [19-1-37-1—19-1-37-28]. Every member of the fire force of any such city who is in active service at the time of the taking effect of this act [June 8, 1937], who is a member of the firemen's pension fund of such city and who has had previous service in the fire department of such city, but who was over the age of thirty-five [35] years at the time of his reinstatement or reappointment shall be entitled to all of the benefits of the firemen's pension fund of such city and all of the years of active service of such fireman on the fire force of such city shall be counted in determining his eligibility for retirement. Every member of the fire force of any such city who is in active service at the time of the taking effect of this act, but who is not a member of the firemen's pension fund of such city, shall, upon the taking effect of this act, be conclusively deemed to be a member of the firemen's pension fund of such city and shall pay, as unpaid assessments, in addition to his current assessments, the same amount into the pension fund as he would have paid as assessments if he had been a member of the pension fund during all of the years of his service. When any member of the fire force of any such city who is not a member of the firemen's pension fund becomes a member of such fund, as hereinbefore provided, such member may, at his own option, elect to pay the amount which is required to be paid as unpaid assessments, in one [1] payment, at the time when he becomes a member of such fund, or to pay such amount in monthly instalments of such amounts, over a period of not to exceed three [3] years as such member may request, and if such unpaid assessments be paid in monthly instalments, the amount payable monthly shall be deducted from the salary of such member, by the city controller or other fiduciary officer, in the same manner as the assessments of members of the fire force are deducted, as

prescribed in subsection (e) of section 8 [19-1-37-11] of this act. If any such member shall die or become disabled before all of such instalments shall have been paid, the unpaid instalments shall be deducted from the benefits payable to him or to his dependents, if any, or if there be no dependents, who are entitled to receive benefits, then such unpaid instalments shall be allowed as a claim against the estate of such person and shall have priority over all general claims. It shall be the duty of the board of trustees to prepare and file such claims, which shall be filed in the name of the board and for the benefit of the firemen's pension fund of such city. Whereas an emergency exists for the immediate taking effect of this section, the same shall be in full force and effect from and after its passage. [Acts 1937, ch. 31, § 15, p. 156.]

19-1-37-19 [48-6532a]. Psychological and mental examination of members.—In addition to the physical examination, the board of trustees shall require such psychological and mental examinations as may be prescribed by the American Insurance Association. No person who fails to pass the mental and psychological examinations shall be appointed or reappointed as a member of the fire department or fire force of any city, town, township or county contemplated in this act [19-1-37-1—19-1-37-28]. [Acts 1937, ch. 31, § 15a, as added by Acts 1967, ch. 208, § 10, p. 444.]

19-1-37-20 [48-6533]. Firemen's pension fund defined.—All money which is collected and received by the board or any officer thereof by virtue of any of the provisions of subsections (a) to (d) inclusive, of section 8 [19-1-37-11], shall be paid to the controller or other fiduciary officer of such city, who shall place all such money so received to the credit of the firemen's pension fund. The firemen's pension fund shall be deemed to be a public fund as defined in, and shall be subject to all of the provisions of chapter 70 of the Acts of the General Assembly of 1935 [repealed], or any acts subsequently enacted providing for

the deposit and safeguarding of public funds. [Acts 1937, ch. 31, § 16, p. 156.]

19-1-37-21 [48-6534]. Payments to beneficiaries and dependents—Procedure.—Payments to beneficiaries and dependents shall be made upon warrant of the city controller or other fiduciary officer, from the firemen's pension fund, upon a verified schedule of such beneficiaries and dependents and the amount payable to each such beneficiary or dependent, prepared and verified by the secretary and signed by the president and countersigned by the secretary of the board. All other claims shall be signed by the president and countersigned by the secretary and shall be paid upon warrant of the city controller or other fiduciary officer. [Acts 1937, ch. 31, § 17, p. 156.]

19-1-37-22 [48-6535]. Pension fund payments not subject to attachment.—No part of such pension fund shall, either before or after any order for the distribution thereof to members of such fire force, or to the widows or guardians of any such child or children, of any such deceased, disabled or retired member of such force, be held, seized, taken, subjected to, detained or levied on by virtue of any attachment, execution, judgment, writ, interlocutory or other order, decree or process, or proceedings of any nature whatsoever issued out of or by any court in this or any other state for the payment or satisfaction, in whole or in part, of any debt, damages, demand, claim, judgment, fine or amercement of such member or his widow or children, but such fund shall be sacredly kept, secured, promoted and distributed for the purpose of pensioning the persons named in this act [19-1-37-1—19-1-37-28], and for no other purpose whatsoever, except that the board may annually expend such sum as it may deem proper from such fund for the necessary expenses connected therewith. [Acts 1937, ch. 31, § 18, p. 156.]

19-1-37-23 [48-6536]. Treasurer — Bond — Duties.—The city treasurer or the county treasurer, acting as city treasurer, is

hereby made the custodian of all of the money belonging to such firemen's pension fund, and all money belonging thereto shall be promptly paid to him. He shall be liable on his bond as such treasurer for the faithful performance of all the duties imposed upon him by the provisions of this act [19-1-37-1—19-1-37-28] in relation to the firemen's pension fund, and for the faithful accounting for all money and securities which may come into his possession and belonging thereto, and he shall keep a separate account thereof, which shall at all times show the true condition of such fund. [Acts 1937, ch. 31, § 19, p. 156.]

19-1-37-24 [48-6537]. Construction.—Nothing contained in this act [19-1-37-1—19-1-37-28] shall be so construed as to affect the status or abridge the term of any member of the board of trustees of the firemen's pension fund of any city contemplated in this act, but such fund shall remain under control of such board until the board of trustees of the firemen's pension fund created under the terms of this act shall have been duly organized, when such board shall at once turn over to the board created under this act all the money, books, papers and property belonging to such firemen's pension fund, and thereafter such fund and all books, papers and property connected therewith shall be under the sole custody, care and management of the board of trustees created under the provisions of this act, and shall be subject in all things to the provisions of this act. [Acts 1937, ch. 31, § 20, p. 156.]

19-1-37-25 [48-6538]. Other acts not repealed.—Nothing contained in this act [19-1-37-1—19-1-37-28] shall be construed to repeal, alter or amend any other law of this state relative to firemen's pensions or firemen's pension funds except insofar as such other law might otherwise apply to cities contemplated in this act. [Acts 1937, ch. 31, § 21, p. 156.]

19-1-37-26 [48-6539]. Effective date—Exception.—This act [19-1-37-1—19-1-37-28], except subsection (a) of section 13 [19-1-37-16] and section 15 [19-1-37-18], shall take effect

at the hour of 12 o'clock, midnight, on the thirty-first [31st] day of December, 1937. [Acts 1937, ch. 31, § 22, p. 156.]

19-1-37-27 [48-6539a]. Temporary loans—Operating expenses—Prohibitions.—The board of trustees of the firemen's pension fund may, by resolution, authorize temporary loans to be made and effected in anticipation of current revenues of any such city actually levied and in the course of collection for the fiscal year in which such loans are made, and thereupon the common council of any such city shall by ordinance authorize such temporary loans and the issuance and sale of securities therefor, in the same manner as is authorized for such city generally in making such temporary loans.

Such board of trustees of the firemen's pension fund is further authorized to provide in its annual budget and to pay out of the funds allocated therefor all necessary expenses of operating such fund, including the payment of all costs of litigation and attorney's fees arising in connection with such fund and the payment of benefits and pensions therefrom, and any such item of expenditures shall not be reduced by the common council, nor the county board of tax adjustment, nor by the state board of tax commissioners, any law of this state to the contrary notwithstanding. [Acts 1937, ch. 31, § 23, as added by Acts 1939, ch. 24, § 1, p. 65.]

19-1-37-28 Application.—The provisions of this act in relation to firemen's pension fund shall apply to all persons receiving pensions from the firemen's pension fund of any such city, town, township or county who have been placed on such pension roll under any former law or laws, and in any application for pension now pending before any such board of trustees, the board herein created shall place such dependents in the class of pensioners as provided in the last two sections. [Acts 1967, ch. 208, § 11, p. 444.]

APPENDIX F.

COURT RULE.

INDIANA RULES OF PROCEDURE

Part II—Rules of Appellate Procedure

* * * * *

Appellate Rule 11

Rehearings and Transfer

(A) Rehearings. Application for a rehearing of any cause may be made by petition, separate from the briefs, signed by counsel, and filed with the clerk within twenty [20] days from rendition of the decision, stating concisely the reasons why the decision is thought to be erroneous. Such application may, if desired, be supported by briefs, but such briefs will not be received after the time allowed for filing the petition. Parties opposing the rehearing may file briefs within ten [10] days after the filing of the petition. No extension of time shall be granted for the filing of a petition for rehearing or any brief in connection therewith.

(B) Transfers. In every case where a petition for rehearing has been filed in the Court of Appeals and denied, the party against whom the decision is rendered shall have a right to petition the Supreme Court within twenty [20] days from the day of the ruling on the petition for rehearing and [to] transfer said cause to the Supreme Court for review; Provided, however, That the petition to transfer shall be limited to only those grounds set forth in the petition for rehearing in the Court of Appeals. The following subsections of this rule shall govern all petitions to transfer a cause to the Supreme Court:

(1) The petition to transfer shall set forth briefly:

(a) That the Court of Appeals decided the case with a written opinion or memorandum decision giving the date when the opinion or memorandum decision was filed;

(b) That the opinion or memorandum decision of the Court of Appeals was against the party seeking transfer;

(c) That a petition for rehearing was filed with the Court of Appeals in time and that a rehearing was denied giving the date of such denial;

(d) That the opinion or memorandum decision of the Court of Appeals is in error in that . . . [specify with particularity wherein the Court of Appeals committed error and the circumstances giving rise to such error].

(2) Errors upon which a petition to transfer shall be based may include:

(a) That the opinion or memorandum decision of the Court of Appeals contravenes a ruling precedent of the Supreme Court, indicating the ruling precedent, or

(b) That the opinion or memorandum decision of the Court of Appeals erroneously decides a new question of law, concisely stating the same, or

(c) That there is a conflict between the opinion or memorandum decision and a prior opinion of the Court of Appeals stating concisely the conflict and opinion in which it occurs, or

(d) That the opinion or memorandum decision of the Court of Appeals correctly followed ruling precedent of the Supreme Court, but that such ruling precedent is erroneous or is in need of clarification or modification, or

(e) The opinion or memorandum decision of the Court of Appeals fails to give a statement in writing of each substantial question arising on the record and argued by the parties. If this error is relied upon, the petition shall

set forth such portions of the record so as to affirmatively disclose such failure, and establish that petitioner was prejudiced thereby.

(3) The opinion or memorandum decision of the Court of Appeals shall be final except where a petition to transfer has been granted by the Supreme Court. If transfer be granted, the judgment and opinion or memorandum decision of the Court of Appeals shall thereupon be vacated and held for naught, and the Supreme Court shall have jurisdiction of the appeal as if originally filed therein, and all the records, briefs and files of said cause on appeal shall be transferred to the Supreme Court.

(4) The denial of a petition to transfer shall have no legal effect other than to terminate the litigation between the parties in the Supreme Court.

(5) In all cases where the Supreme Court is evenly divided, either upon the question of accepting or denying transfer, or upon the proper disposition of the cause once transfer is granted, transfer shall be deemed denied and the decision of the Court of Appeals shall be affirmed and becomes the law of the case.

(6) Briefs may be filed with and in support of a petition to transfer, but they shall not be necessary to invoke the jurisdiction of the court. Parties opposing the transfer may file briefs within ten [10] days after the filing of the petition or briefs of petitioner, whichever is later.

(7) Upon the filing of a petition to transfer or an appeal to the Supreme Court or Court of Appeals, the petitioner or appellant shall pay a filing fee of one hundred dollars [$100] to be collected by the clerk of this court for the state of Indiana in addition to any other filing fees to be paid to said clerk. The payment of a filing fee shall not be applicable in a case where it is prosecuted as a pauper cause, or on behalf of a state or government unit. Burns' 4-215 [Acts 1901, ch. 247, § 10, p. 565; 1933, ch. 151, § 1, p. 800] is hereby vacated and set aside and held for naught.

(8) No petition for rehearing will be permitted to be filed upon the denial of a petition to transfer. No extension of time shall be granted for the filing of the petition to transfer or accompanying briefs. (As amended April 5, 1971; amended August 9, 1971, effective January 1, 1972; amended May 2, 1973; amended November 24, 1975, effective January 31, 1976.)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1485

THOMAS J. HILLIGOSS and KAY BERRYMAN,
On Behalf of Themselves and All Others Similarly Situated,
Appellants,

vs.

ARTHUR J. LADOW, As Mayor of the City of Kokomo, Indiana, Et Al.,
Appellees.

GERALD SWING and MARGARET TOMLINSON,
On Behalf of Themselves and All Others Similarly Situated,
Appellants,

vs.

ARTHUR J. LADOW As Mayor of the City of Kokomo, Indiana, Et Al.,
Appellees.

APPEAL FROM THE COURT OF APPEALS OF INDIANA, SECOND DISTRICT.

MOTION

ALAN H. LOBLEY
Ice Miller Donadio & Ryan
111 Monument Circle, 10th floor
Indianapolis, Indiana 46204

Central Publishing Company, Inc., Indianapolis, Ind. 46206

IN THE

United States Supreme Court

THOMAS J. HILLIGOSS and KAY BERRYMAN, on behalf of themselves and all others similarly situated, *Plaintiffs-Appellants,* vs. ARTHUR J. LaDOW, as Mayor of the city of Kokomo, Indiana; et at., *Defendants-Appellees.*	)
GERALD SWING and MARGARET TOMLINSON, on behalf of themselves and all others similarly situated, *Plaintiffs-Appellants,* vs. ARTHUR J. LaDOW, as Mayor of the city of Kokomo, Indiana et at., *Defendants-Appellees.*	)

MOTION TO DISMISS OR AFFIRM

Come now the defendants and respectfully request the Court to dismiss this appeal on the ground that it does not

present a substantial federal question and that the state court judgement rests on an adequate non-federal basis.

ICE MILLER DONADIO & RYAN

By _____
Alan H. Lobley

ICE MILLER DONADIO & RYAN
111 Monument Circle, 10th Fl.
Indianapolis, Indiana 46204
(317) 635-1213

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Motion to Dismiss or Affirm and the attached brief has been deposited in the United States mail, postage prepaid, this_____day of May, 1978, addressed to:

Mr. Donald A. Schabel
111 Monument Circle, Suite 1200
Indianapolis, Indiana 46204

Mr. Paul I. Hillis
3415 South LaFountain Street
Atrium Building
Suite 1
Kokomo, Indiana 46901

_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1485

THOMAS J. HILLIGOSS and KAY BERRYMAN,
On Behalf of Themselves and All Others Similarly Situated,
Appellants,

vs.

ARTHUR J. LADOW, As Mayor of the City of Kokomo, Indiana, Et Al.,
Appellees.

GERALD SWING and MARGARET TOMLINSON,
On Behalf of Themselves and All Others Similarly Situated,
Appellants,

vs.

ARTHUR J. LADOW As Mayor of the City of Kokomo, Indiana, Et Al.,
Appellees.

APPEAL FROM THE COURT OF APPEALS OF INDIANA, SECOND DISTRICT.

BRIEF

ALAN H. LOBLEY
Ice Miller Donadio & Ryan
111 Monument Circle, 10th floor
Indianapolis, Indiana 46204

Central Publishing Company, Inc., Indianapolis, Ind. 46206

INDEX

CITATIONS

Cases

Statutes

Indiana Code:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1485

THOMAS J. HILLIGOSS and KAY BERRYMAN,
On Behalf of Themselves and All Others Similarly Situated,
Appellants,

vs.

ARTHUR J. LADOW, As Mayor of the City of
Kokomo, Indiana, Et Al.,
Appellees.

GERALD SWING and MARGARET TOMLINSON,
On Behalf of Themselves and All Others Similarly Situated,
Appellants,

vs.

ARTHUR J. LADOW As Mayor of the City of
Kokomo, Indiana, Et Al.,
Appellees.

APPEAL FROM THE COURT OF APPEALS OF INDIANA, SECOND DISTRICT.

BRIEF IN SUPPORT OF MOTION TO DISMISS OR AFFIRM

I. Facts

This is an appeal from the decision of the Court of Appeals of Indiana upholding a determination by the

Howard County Superior Court denying in part plaintiffs' class action petition for mandate seeking to compel the Board of Trustees of the Police Pension Fund and the Board of Trustees of the Firemen's Pension Fund of the City of Kokomo, Indiana to increase certain pensions for retired policemen, firemen, their widows and dependents, by including in the base for the calculation of the pension benefits certain fringe benefits that had not before been considered as part of the pension base.

The police and firemen's pensions for the City of Kokomo, Indiana were created by statute in 1937 (IC 19-1-24-1 et seq. and IC 19-1-37-1 et. seq. hereinafter referred to as the "Pension acts"). The amount of the benefits was based upon a percentage of the "monthly wage" or "salary" of active firemen and upon the "monthly pay" or "salary" of active policemen.

The City of Kokomo interpretated the language of the Pension acts as not including certain fringe benefits such as optional matching health insurance premiums, or clothing and equipment allowances, within the definition of the terms "monthly wage", "monthly pay", or "salary" for the purpose of calculating pension benefits. From 1937 until this action was initiated, those fringe benefits were not included in the calculation of pension benefits under the Pension acts.

This action was filed as a mandate action seeking to compel the city of Kokomo to change this long-standing interpretation of the Pension acts by altering the definition of "monthly pay", "monthly wage", and "salary" for the purpose of increasing those pensioners' benefits. Upon trial of this matter the Howard Superior Court issued its ruling finding that the optional matching health insurance premium program of the City of Kokomo did not constitute "wages" or "salary" within the meaning of the Pension acts, nor did the clothing and equipment allowance provided to

active police and firemen fall within the meaning of those terms as they are used in the Pension acts.

Following the perfection of the appeal of the Howard County Court decision, the Indiana General Assembly amended the Pension acts in order to attempt to clarify the legislative intent of the prior law by stating:

> "...it has never been the intention of the General Assembly that remuneration or allowances for fringe benefits, incentive pay, holiday pay, insurance, clothing, automobiles, firearms, education, overtime or compensatory time off be used in the calculation of benefits under IC 18-1-12, IC 19-1-18, IC 19-1-24, IC 19-1-25-4 or IC 19-1-37..." (IC 19-1-46, hereinafter referred to as the "Amendment")

The Amendment also defined the term "salary" as used in the Pension acts to exclude remuneration or allowances for fringe benefits, incentive pay, holiday pay, insurance, clothing, automobiles, firearms, education, overtime or compensatory time off.

II. Argument

It is conceivable that a federal question could arise if the Court of Appeals of Indiana had first found that these fringe benefits were included within the definition of "salary" for the purpose of calculating the pension base under the Pension acts, but that the Amendment was binding on the Court and removed those benefits. However, the Court of Appeals of Indiana did nothing of the kind. The Court specifically found the Amendment *not* to be binding upon the Court in determining what pension benefits were intended in the original act. The opinion denies that the Court could even allow a subsequent legislative expression to *influence* its judicial determination, if the plain language of the Pension act had expressed a contrary meaning.

The Court then found that its independent evaluation of the statutory language of the Pension acts demonstrated both that the language was ambiguous, and therefore a proper subject for judicial interpretation, and that the intent of the legislature as indicated by the language of the statute was not to include such fringe benefits in the calculation of the pension base.

The petitioner would have this Court believe that the fringe benefits in question were considered to be "salary" for the purpose of calculating the pension base for the City of Kokomo until that base was altered by the legislature's adoption of the Amendment to the Pension act. Nothing could be further from the truth. Since the Pension act was passed in 1937, pensioners in the City of Kokomo have never received pensions which included the questioned fringe benefits in the pension base.

As important as the parties' interpretation of the contract since 1937, however, is the ruling of the trial court. *Before* the Amendment was enacted. the Howard County Superior Court held that the fringe benefits in question did not fall within the meaning of "salary" for the purpose of the Pension act. That decision meant that at the time the Amendment was passed, it had already been judicially determined that the proper construction of the pension statute excluded optional matching health insurance premium benefits and clothing and equipment allowances from the determination of the pension base.

The rationale of that decision is set forth in the opinion of the Howard County Superior Court, which is attached to petitioners' jurisdictional statement. Little purpose would be accomplished by reviewing that decision other than to note that the matter was resolved as a matter of relatively routine interpretation of an obviously ambiguous provision of the Pension acts as it would apply to the fringe benefits involved.

Arguments can be made that the legislature should have chosen to include all fringe benefits in the calculation of the pension base. Arguments can also be made that the ambiguity in the original statute could have been resolved in favor of the petitioners' position, instead of to the contrary. However, it is not the function of the Supreme Court of the United States to review a state court's interpretation of a state statute simply because a contract is involved. It is only legislative action, and not judicial, which can form the basis for an impairment of contract and create a federal constitutional question.

> "As this court has repeatedly ruled, the Constitution affords no protection as against an impairment by judicial decision." *Columbia R. and Electric Company v. South Carolina* 261 U.S. 236, 67 L. Ed. 629, 43 Sup. Ct. Rep. 306 (1923).

The petitioner is simply asking the Supreme Court of the United States to substitute its judgement for that of the legislature and courts of the State of Indiana concerning what petitioners feel should have been included in the firemen's and policemen's pension base in the City of Kokomo. It is the job of the state courts in the State of Indiana to determine the intent of the Indiana legislature and to judicially construe the 1937 Pension acts. No federal question justifying the intervention of the United States Supreme Court is created simply because the petitioners wish the courts had construed the Pension acts differently.

Had the legislature done nothing at all to clarify the ambiguity in the Pension acts, the Court of Appeals of Indiana would simply have affirmed the decision of the Howard County Superior Court on the same grounds that are stated in the opinion of the Court of Appeals of Indiana, which opinion is also attached and made a part of the petitioners' jurisdictional statement. The matter so concluded would have obviously raised no federal question

and this appeal, if pursued, would be dismissed as a matter of course.

The passage of the Amendment and the mention of the Amendment in the opinion of the Court of Appeals of Indiana does not alone allow the petitioner to make a claim that the Amendment constituted a legislative impairment of a vested contract right. A reading of the opinion of the Court of Appeals of Indiana demonstrates quite conclusively that the Amendment was not the basis of the Court's ruling, which was instead based upon the same type of analysis of the language of the original Pension acts which resulted in the trial court's finding that the fringe benefits in question did not form a part of the pension base under the language of the statute as it was originally written. While the opinion cites the Amendment, its comments concerning the proper use and consideration of the Amendment make it quite clear that it was not given the effect the petitioner claims.

> "The expression of a subsequent legislature's opinion as to the proper construction of a statute passed by a previous legislature has no judicial force. The reasons behind this rule as presented in *Bettenbrock v. Miller* (1916) 185 Ind. 600, 112 N.E. 771, are worth restating. First and foremost, the responsibility for construing doubtful statutes is a judicial power which is vested exclusively in the courts of the state. Legislative interference with that judicial function is prohibited by the Indiana Constitution, Article 3, Section 1. It is furthermore the intent of the legislature that passed the act which the Court seeks to ascertain, not the intent of a subsequent legislature."
>
> "A subsequent legislative expression cannot control or influence the judicial determination when the plain language of the statute expresses a contrary meaning. *Bettenbrock v. Miller, supra.* (185 Ind. at 607) 112 N.E. at 774. Otherwise, particularly in a case such as this, there is the danger that the subsequent legislation may impair vested rights. *Klamm v. State ex. rel. Carlson* (1955) 235 Ind. 289, 292-93, 126 N.E. 2d 487, 489."

These statements are in stark contrast to the State Court finding in *Columbia R. Gas and Electric Company v. South Carolina* that the subsequent legislation was binding upon the Court.

Following the Court's acknowledgement that the statute cannot be given binding effect, the Court goes on to find that the language of the Pension acts compels the same conclusion.

> "More importantly, the statutory language in force at the time dictates the conclusion that salary is used in a restricted sense and does not include the City's contributions to the group insurance plan."

In attempting to demonstrate that the decision of the Court of Appeals of Indiana was based upon the Amendment and not upon an interpretation of the original pension acts, the petitioner is forced to resort to tricks of editing to make their description of the opinion read far differently from the opinion itself. Petitioner cites at the top of page 15 the following language from the Court of Appeals' opinion which petitioners put forth as an indication that the basis of the decision of the Court of Appeals was the Amendment, not the language of the Pension acts themselves.

> "Fortunately, we are not without some guidance in ascertaining which of these alternative approaches the General Assembly intended to adopt. Subsequent to the perfection of this appeal, the Indiana General Assembly amended the Pension statutes in several respects pertinent to the issues under consideration here."

The petitioner omitted to note that the "guidance" referred to by the Court in that portion of the opinion was not limited to the enactment of the Amendment, as the

quote out of context would indicate. It is placed into context in the sentence immediately following the brief discussion by the Court of why the legislative declaration is *not* binding upon it. The Court then goes on to state:

> "More importantly, the statutory language in force at the time dictates the conclusion that salary is used in a restricted sense and does not include the City's contributions to the group insurance plan."

Even if we were to assume that it would be improper for the Court to find "guidance" from the enactment of the Amendment, (which we do not concede) the language of the decision makes it clear that the same "guidance" was also derived from the language of the Pension acts as they were originally passed.

The same game is played with respect to the subsequent paragraph on Page 15 of petitioners' brief where it is represented that the conflicting earlier opinion of the Attorney General was rejected by the Court of Appeals on the grounds that "the recent legislative amendments to the Pension provisions indicate just the opposite."

The meaning of the language cited is severely distorted by the petitioners' omission of the intervening sentence. The Court was not citing the Amendment as an indication that the Attorney General's position should be rejected. It was citing the Amendment to demonstrate that an argument cannot be made that the legislature acquiesced in the Attorney General's interpretation by failing to take action following its publication. The full quote is as follows:

> "We are aware that an official opinion of the Attorney General expresses a contrary interpretation. 1973 OAG No. 35, page 108. However, such opinions are not judically binding and there is no indication here that the General Assembly meant to acquiesce in the construction given by the Attorney General. (Cities omitted) The recent legislative amendments to the pension provisions indicate just the opposite."

It is clear from the language of the opinion of the Court of Appeals of Indiana that the Court did not give effect to the allegedly unconstitutional Amendment, but simply agreed with the opinion of the trial court that the Pension acts when passed did not intend to include clothing and equipment allowances or optional health insurance premium programs as a part of the pension base. Since the decision was reached without reliance upon the Amendment, no federal question of legislative impairment of contract exists for the Court to review.

> "If the judgement of the state court gives no effect to the subsequent law of the state, and the state court decides the case upon grounds independent of that law, a case is not made for review by this court upon any ground of the impairment of a contract." *Bacon v. Texas*, 163 U.S. 207, 216, 41 L. Ed. 132, 136, 16 Sup Ct. Rep. 1023.

Petitioners recognize that the Indiana Court's decision is stated to be based upon an analysis of the original Pension acts, and not the Amendment. They attempt to avoid that complication by noting that the Supreme Court of the United States may choose to ignore the state grounds for a decision if it is apparent that the non-federal basis of the decision is "so certainly unfounded that it properly may be regarded as essentially arbitrary, or a mere device to prevent a review of the decision upon the federal question." *Enterprise Irrigation District v. Farmers Mutual Canal Company*, 243 U.S. 157, 164, 37 Sup. Ct. Rep. 318.

The absurdity of that position in this case, however, is evident by the fact that the decision of the Court of Appeals was a decision *upholding* the interpretation of the Pension acts made by the trial court. Since the trial court made its interpretation of the Pension acts adversely to the petitioner *before* the Amendment was enacted, it is obvious that the trial court decision was not "a mere device to

prevent review" of a real intention to give effect to an act not yet in existence. Unless the Court chooses to characterize the finding of the Howard County Superior Court, the Court of Appeals of Indiana and the Indiana Supreme Court as to the proper interpretation of the Pension acts as being so clearly wrong as to be disregarded as "essentially arbitrary", then the non-federal ground of the decision is sufficent to preclude Supreme Court review.

Even if upon review of the opinions of the Howard County Superior Court and the Court of Appeals this court should feel that it might have reached an opposite conclusion as a matter of first impression, it is inconceivable that this court could evidence so little respect for the state courts perogatives as to find a construction acquiesced in by the parties for forty years and upheld by two tribunals of the state to be so clearly wrong as to be properly ignored as "essentially arbitrary" in order to find the existence of a federal question to review.

The petitioner has had his day in court before the trial court, Court of Appeals and Supreme Court of the State of Indiana. He has been unsuccessful in all three forums in convincing the courts of this state that the original Pension Act should not continue to be interpretated as the City of Kokomo has interpretated it for the past forty years. The asserted constitutional question is a transparent attempt to find yet one more court and one more opportunity for the petitioner to pursue its claim to be entitled to that which neither the legislature nor judiciary of the State of Indiana presently intends or ever intended to provide in pension benefits. No federal constitutional questions lay at the base of any of the decisions in the state courts of Indiana. No substantial federal question presently exists which would justify the exercise of the jurisdiction of the Supreme Court of the United States.

III. Conclusion

The court should dismiss this appeal on the grounds that no federal question is involved and/or that the decision appealed from rests firmly upon an adequate non-federal ground for support.

Respectfully submitted,

Alan H. Lobley
Ice Miller Donadio & Ryan
111 Monument Circle, 10th floor
Indianapolis, Indiana 46204

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1485

THOMAS J. HILLIGOSS AND KAY BERRYMAN, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Appellants,

vs.

ARTHUR J. LADOW, AS MAYOR OF THE CITY OF KOKOMO, INDIANA, ET AL.,
Appellees.

GERALD SWING AND MARGARET TOMLINSON, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Appellants,

vs.

ARTHUR J. LADOW, AS MAYOR OF THE CITY OF KOKOMO, INDIANA, ET AL.,
Appellees.

APPEAL FROM THE COURT OF APPEALS OF INDIANA, SECOND DISTRICT.

APPELLANTS' BRIEF OPPOSING MOTION TO DISMISS.

DONALD A. SCHABEL,
111 Monument Circle,
Suite 1200,
Indianapolis, Indiana 46204,
(317) 636-5511,
Attorney for Appellants.

PAUL I. HILLIS,
3415 South LaFountain Street,
Atrium Building,
Suite 1,
Kokomo, Indiana 46901,
(317) 453-2374,
Of Counsel.

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1485

THOMAS J. HILLIGOSS AND KAY BERRYMAN, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Appellants,

vs.

ARTHUR J. LaDOW, AS MAYOR OF THE CITY OF KOKOMO, INDIANA, ET AL.,
Appellees.

GERALD SWING AND MARGARET TOMLINSON, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Appellants,

vs.

ARTHUR J. LaDOW, AS MAYOR OF THE CITY OF KOKOMO, INDIANA, ET AL.,
Appellees.

APPEAL FROM THE COURT OF APPEALS OF INDIANA, SECOND DISTRICT.

APPELLANTS' BRIEF OPPOSING MOTION TO DISMISS.

ARGUMENT.

Appellants' jurisdictional statement makes a showing that the construction of the pension statutes, IC 19-1-24 and IC 19-1-37,

put forward by the Court of Appeals of Indiana, Second District, is untenable and that the result in the case could have been reached only by giving effect to IC 19-1-46, the statute whose validity is in question on this appeal. Although appellees have moved to dismiss this appeal on the ground that it does not present a substantial federal question and that the judgment rests on an adequate non-federal basis, they have made no attempt to show that the construction of the pension statutes adopted by the court below has any fair or substantial support in prior authority or sound reason. They simply take the position that it is none of this Court's business whether the construction adopted is right or wrong. (Brief, p. 5.) However, the cases cited in the jurisdictional statement to sustain the jurisdiction of this Court hold to the contrary.

In arguing that the court of appeals did not give effect to IC 19-1-46, appellees make the following points: (1) that the pensioners had acquiesced for 40 years in a construction of the pension statutes by the city of Kokomo that excluded fringe benefits from the computation of pensions; (2) that the Howard Superior Court had upheld such construction with respect to health insurance premiums and clothing allowances prior to the enactment of IC 19-1-46; and (3) that the decision of the Court of Appeals of Indiana, Second District, merely agreed with the lower court's interpretation of the pension statutes. They conclude, on the basis of this reasoning, that it is absurd for appellants to argue that the court of appeals gave effect to IC 19-1-46.

At the outset, it is necessary to correct appellees' statement that "the police and firemen's pensions for the City of Kokomo, Indiana were created by statute in 1937." (Brief, p. 2.) While the firemen's pension statute, IC 19-1-37, had its origin in Acts 1937, Ch. 31, the police pension statute, IC 19-1-24, dates from Acts 1925, Ch. 51. As originally enacted, pensions payable upon retirement were fixed sums ranging from $50.00 to $75.00 per month, depending upon length of service. Acts 1931, Ch. 58,

amended the statute to authorize the board of trustees of the police pension fund to calculate pensions based upon "50% per month of such salary as is at the time of such application paid to a first-class patrolman." The amount of the pension did not vary as the salary of the first-class patrolman changed. *Klamm* v. *State of Indiana ex rel. Carson,* 235 Ind. 289, 126 N. E. 2d 487 (1955). The provisions of the statute requiring pensions to fluctuate as the pay of active policemen increases or decreases were added to the statute by Acts 1955, Ch. 77, § 2, effective January 1, 1956.

The first fringe benefit paid by the city of Kokomo to active policemen and firemen was the clothing allowance authorized by IC 19-1-10. This statute had its origin in Acts 1949, Ch. 14, and was effective January 1, 1950. The minimum authorized allowance was initially $100.00 per year. Starting in 1960 the minimum allowance was raised to $125.00 per year, and in 1968 to $200.00 per year, where it has since remained. The city of Kokomo started paying the allowance in 1951 and never paid more than the statutory minimum until 1972. In that year it raised the amount paid from $200.00 to $400.00 per year, and in 1973 it increased the amount to $500.00 per year.

Fringe benefits other than the clothing allowance were first paid in 1971. In that year, the city commenced paying holiday pay and 49% of health insurance premiums. In 1975, it started paying shift premium pay in the police department. Since prior to 1971 the only fringe benefit paid was the statutory minimum clothing allowance, which was a negligible factor in the compensation of active policemen and firemen, it is a gross distortion for appellees to argue that pensioners had acquiesced since 1937 in a construction of the pension statutes that excluded fringe benefits from the computation of pensions. On the contrary, when fringe benefits started to become an increasingly substantial factor in the compensation of active policemen and firemen, the pensioners promptly registered their protests, formed an association, met with city officials over a period of many

months, and ultimately brought the actions that are involved on this appeal.

Appellees place great importance on the ruling of the trial court, since it was made prior to the enactment of IC 19-1-46. They contend that the opinion of the court of appeals was "based upon the same type of analysis of the language of the original Pension acts which resulted in the trial court's finding that the fringe benefits in question did not form a part of the pension base under the language of the statute as it was originally written." (Brief, p. 6.) This is simply not true. The court of appeals did not adopt the rationale of the trial court's opinion but formulated an entirely different rationale that would give full effect to IC 19-1-46. An analysis of the opinion of the trial court, which is appended to the Jurisdictional Statement at pp. A16-A24, will make this very clear.

Four fringe benefits, which had been excluded from pension computations, were at issue in the trial court. These were holiday pay, shift premium [a form of incentive] pay, health insurance and clothing allowance. All four are excluded from pension calculations by the subsequently enacted IC 19-1-46. Nevertheless, the trial court held for appellants with respect to the first two-named fringe benefits.

In considering holiday pay, the trial court did not purport to construe the statutory language but simply and directly held that "there is no showing of any rational basis to deny that this holiday pay is a part of their salary or wages, and holiday pay should be included as a part of salary or wages for the purpose of computing the pensions to which plaintiffs are entitled." (Page A17.) Since holiday pay is paid annually in a single lump sum, this holding is squarely opposed to the construction of the pension statutes adopted by the court of appeals that "the interchangeable use of the words 'salary' and 'monthly pay' ('monthly wage') signifies that the benefit formula has reference to a first-class patrolman's or fireman's *regular salary*, exclusive of fringe benefits and other forms of added compensation." (Page A8.)

In considering shift premium pay, the trial court noted "that pension statutes are enacted to benefit the pensioners and are to be liberally construed in favor of the pensioner," and "that police and firemen's pensions are to be computed from the salary or the compensation of the 'highest paid' first-grade patrolman or first-class fireman in the department." In holding that shift premium pay should be included in pension calculations, the trial court concluded that "clearly, the highest paid would be the person in the department who is drawing maximum longevity pay and maximum shift premium pay." (Pages A18-A19.) By contrast, the court of appeals held that the pension statutes are "ultimately directed toward the general welfare of the taxpaying public." (Page A10.)

In considering health insurance contributions by the city, the trial court noted that salary and wages are taxable as income and noted that 26 U. S. C. § 106 excludes employer's contribution to health insurance from the employee's gross income and that 42 U. S. C. 409(9)(b) defines wages, for purposes of Social Security, as not including payments made by an employer on account of an employee's health insurance. Accordingly, the trial court held that health insurance contributions by the city are not salary or wages within the meaning of the pension statutes. (Pages A20-21.) By contrast, the court of appeals conceded that health insurance contributions are "an integral part of the compensation package," but held that "employer insurance programs and other fringe benefits are not salary in the sense of a fixed amount payable at stated intervals." (Page A6.) However, the court of appeals ignored the fact that the employer's contributions supplement the employee's portion of the premium that is deducted from each paycheck. Thus, the court of appeals rejected the rationale put forward by the trial court to justify exclusion of health insurance contributions from pension calculations and substituted a rationale of its own that is untenable in the light of the facts.

In considering the clothing allowance, the trial court noted that pensioners are not required to wear uniforms but ignored the fact that the allowance is paid to active members of the police and fire departments who are not required to wear uniforms. It also relied on IC 19-1-10-2, regarding uniforms furnished by the city, which is wholly irrelevant to the situation where the city elects to pay a clothing allowance. Moreover, since the clothing allowance must be reported by the recipient as gross income under 26 U. S. C. § 61, the exclusion of the clothing allowance from pension calculations is inconsistent with the rationale adopted by the trial court to justify exclusion of health insurance contributions. By contrast, the rationale adopted by the court of appeals is that " 'salary' does not include all forms of compensation, only that which is paid on a regular and periodic basis in exchange for services," and that "the annual cash payment is supplemental to, and not an integral part of, the employee's *regular salary*." (Page A12.)

In summary, it is clear that the rationale of the opinion of the trial court equates the words "salary" and "monthly wage" with compensation in general but holds that health insurance contributions and clothing allowance are not compensation. In contrast, the court of appeals concedes that health insurance contributions and clothing allowance are compensation but holds that the words "salary" and "monthly wage," as used in the pension statutes, mean something less than total compensation. Since the part of the trial court's decision excluding health insurance contributions and clothing allowance from pension calculations is inconsistent with the part that includes holiday pay and shift premium pay, and since the legislature in IC 19-1-46 directed that all fringe benefits, including the four just named, be excluded from such calculations, it is clear that the court of appeals in its decision gave effect to IC 19-1-46, because it adopted a rationale, however untenable, that would accomplish the purpose. In *Houston & Texas Central R. Co.* v. *Texas,* 177 U. S. 66 (1900), it was held that a decision of a state court may

give effect to a state statute and thereby impair the obligation of a contract, although the court does not mention the statute.

Respectfully submitted,

DONALD A. SCHABEL,
111 Monument Circle,
Suite 1200,
Indianapolis, Indiana 46204,
(317) 636-5511,
Attorney for Appellants.

PAUL I. HILLIS,
3415 South LaFountain Street,
Atrium Building,
Suite 1,
Kokomo, Indiana 46901,
(317) 453-2374,
Of Counsel.